Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

Maurice Clarett,

Petitioner,

v.

National Football League,

Respondent.

On Petition For Writ Of Certiorari
To The Second Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Second Circuit properly invoke the nonstatutory labor exemption to shelter from antitrust review an otherwise naked restraint of trade, the NFL draft eligibility rule, where that rule impacted only strangers to the collective bargaining relationship, did not vitally affect the wages, hours, and terms and conditions of employment of NFL employees, and was not the product of bona fide bargaining?

2. Did the Second Circuit properly balance inherently conflicting antitrust and labor law policies by holding that the antitrust laws are extinguished whenever an anticompetitive agreement among a group of employers is imposed "on a labor market organized around a collective bargaining relationship"?

3. Did the Second Circuit properly conclude that employment eligibility rules fall within the meaning of "wages, hours, and other terms and conditions of employment" under the National Labor Relations Act?

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OPINIONS AND ORDERS BELOW

On February 5, 2004, a judge of the United States District Court for the Southern District of New York granted summary judgment in favor of plaintiff Maurice Clarett ("Clarett" or "petitioner"). The court's Opinion and Order are published at 306 F. Supp. 2d 379 (S.D.N.Y. 2004) and can be found in the Appendix (when abbreviated, "App.") at 1.

On May 24, 2004, a panel of the United States Court of Appeals for the Second Circuit reversed the Opinion and Order of the District Court. The court's decision is published at 369 F.3d 124 (2d Cir. 2004) and can be found in the Appendix at 61.

On October 15, 2004, the judges of the Second Circuit denied Clarett's Petition For Panel Rehearing And Rehearing En Banc. The court's Order incorporating its decision can be found in the Appendix at 98.

JURISDICTION

The Second Circuit's decision was entered on May 24, 2004. On October 15, 2004, the Circuit entered an Order denying the Petition For Panel Rehearing And Rehearing En Banc. This Court has jurisdiction over this matter under 28 U.S.C. § 1254.

STATUTORY PROVISIONS

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal ... ."

Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157, provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ... ."

Section 8(d) of the NLRA, 29 U.S.C. § 158(d), defines collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."

STATEMENT OF THE CASE

At issue in this case is whether the National Football League's ("NFL") draft eligibility rule ("Rule"), a concerted refusal to allow a prospective player to be eligible for the NFL player draft unless three full college seasons have elapsed since his high school graduation, is shielded from antitrust scrutiny because of the nonstatutory labor exemption to the antitrust laws. The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1331.

An NFL draft eligibility rule has been in existence for fifty years. It is not now, and it never has been, contained within any collective bargaining agreement ("CBA"). The NFL did not recognize the National Football League Players Association ("NFLPA") as the players' collective bargaining representative until 1968, when it negotiated its first CBA with that labor organization. App. at 6. Nowhere in that first agreement, or any subsequent agreement, did such a rule appear. The current CBA, negotiated in 1993 and extended three times, comprises 292 pages, 61 articles, appendices A

through N, and 357 sections, but, like its predecessors, does not contain the Rule. Record at Exhibit I.

Clarett, who is six feet tall and weighs 230 pounds, is as tall or taller than NFL running back legends Walter Payton, Barry Sanders, and Gale Sayers, and weighs as much as, or more than, they did during their careers. App. at 14. Clarett graduated high school in December 2001. The District Court described his subsequent achievements in detail. App. at 13-15.

Both Clarett and Michael Williams ("Williams"), a similarly situated and gifted football player, were twenty years old at the time of the 2004 draft. Throughout this litigation, the NFL has attempted to justify the Rule upon health and safety concerns and its desire to protect young players from injury. Nevertheless, just four days after the Court of Appeals stayed the District Court's decision in this case, NFL teams drafted five individuals the same age as Clarett and Williams, three of whom were among the first nine players selected. Indeed, several NFL players have been as young or younger than Clarett was at the start of the 2004 season, including Emmitt Smith, who has rushed for more yards than any player in NFL history, and was twenty years old when he was drafted in 1990.

After the District Court rendered its decision striking down the Rule, Clarett and Williams hired agents. For this reason, Clarett and Williams can no longer play as amateurs in the NCAA. Because of the Rule, they cannot play as professionals in the NFL either. They are players without a game who, as a result of the Second Circuit's decision in this case, have sustained losses in the millions of dollars.

REASONS FOR GRANTING CERTIORARI

Review in this case is not only warranted, it is necessary to preserve the primacy of this Court's previous decisions striking a balance between conflicting national policies of free

economic competition and the rights of employees to bargain collectively.

A review of the two contrasting opinions below yields clear reasons for granting certiorari. The District Court's decision is consistent with this Court's precedents and with the decisions of the Sixth, Eighth, and Ninth Circuits. The Second Circuit's decision, on the other hand, conflicts with the decisions of those Circuits and directly contravenes both this Court's previous decisions and its express instruction to the circuit courts in Brown v Pro Football, Inc., 518 U.S. 231 (1996).

I.

The District Court recognized that "Clarett's challenge to the Rule raises serious questions arising at the intersection of labor law and antitrust law, not to mention the intersection of college football and professional football." App. at. 1. In rejecting the NFL's argument that the Rule was immune from antitrust scrutiny because of the nonstatutory labor exemption to the antitrust laws, the District Court found that the Rule does not concern a mandatory subject of bargaining under the NLRA, restrains only non-employees, and "did not clearly result from arm's length negotiations." App. at. 1-2. Without the shield of the labor exemption to protect the Rule, the court found the Rule to be "blatantly anticompetitive" and determined that "Clarett has alleged the very type of injury – a complete bar to entry into the market for his services – that the antitrust laws are designed to prevent." App. at 2. Quoting Learned Hand, the court observed "that the antitrust laws will not tolerate a contract 'which unreasonably forbids any one to practice his calling.'" App. at 2.

The District Court observed that the Supreme Court had "implied [the nonstatutory labor] exemption from federal labor

statutes, which set forth a national labor policy favoring free and private collective bargaining, *which require good-faith bargaining over wages, hours, and working conditions* ..." and that, like all exemptions to the antitrust laws, the nonstatutory labor exemption must be narrowly construed. App. at 19-21 (emphasis in original). Indeed, this Court has cautioned that the nonstatutory labor exemption must not be used as a "cat's-paw to pull the employer's chestnuts out of the antitrust fires." See United States v. Women's Sportswear Mfg. Ass'n, 336 U.S. 460, 464 (1948).

In deciding whether to invoke the exemption, the District Court used the three-pronged standard set forth by the Eight Circuit in Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976) ("Mackey standard") and followed by the Sixth and Ninth Circuits. In reversing the District Court, the Second Circuit expressly rejected the Mackey standard, thereby creating a split among the Circuits. The Mackey standard seeks to balance important, but inherently conflicting, antitrust and labor law considerations by requiring the presence of three elements before an agreement is immune from antitrust review. As the Eighth Circuit stated in Mackey,

> [f]irst, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. ... Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. ... Finally, the policy favoring collective bargaining is furthered only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.

See Mackey, 543 F.2d at 614; accord Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades District Council, 817 F.2d 1391, 93 (9th Cir. 1987); McCourt v. California Sports, Inc., 600 F.2d 1193, 1197-98 (6th Cir. 1979). Because labor law mandates collective bargaining only over "wages, hours, and other terms and conditions of employment," the District Court reasoned, "only agreements on these subjects (and intimately related subjects) are exempt from the antitrust laws." App. at 23. In so doing, it looked to Brown, where this Court "reiterated that the exemption is limited to mandatory subjects of collective bargaining and covers only conduct that arises from the collective bargaining process." App. at 24.

Inasmuch as mandatory subjects of bargaining apply only to employees, the exemption may only be used to shield agreements that affect employees who will be bound by those actions. Clarett and similarly situated athletes are not employees within the meaning of the NLRA, nor does the NFLPA represent them in any capacity, including collective bargaining, nor are they even eligible for employment or inclusion in the collective bargaining unit.

In addressing whether the Rule falls within the meaning of "wages, hours, and other terms and conditions of employment" under the NLRA, the District Court observed that the Rule makes no reference to wages, hours, or conditions of employment of employees or persons eligible for employment. Instead, it renders a class of otherwise qualified persons who are not employees "*unemployable*." App. at 25 (emphasis in original). The court thus concluded that the NFL's reliance on three Second Circuit cases, Wood v. National Basketball Association, 809 F.2d 954 (2d Cir. 1987), National Basketball Association v. Williams, 45 F.3d 684 (2d Cir. 1994), and Caldwell v. American Basketball Association, 66 F.3d 523 (2d Cir. 1995), was misplaced. It observed that, in sharp contrast to

this case, the practices challenged in each of those cases involved the wages, hours, or working conditions of employees. Wood and Williams were NBA employees who were represented by the players association, but nevertheless challenged a salary cap agreement the league had negotiated with their union. See Wood, 809 F.2d at 956; cf. Williams, 45 F.3d at 686. Caldwell was a former player challenging his discharge. See Caldwell, 66 F.3d at 525-26.

The District Court distinguished these three cases, stating:

> In sum, none of the cases cited by the NFL involve job *eligibility*. The league provisions addressed in *Wood, Williams,* and *Caldwell* govern the terms by which those who *are drafted* are employed. The [draft eligibility rule], on the other hand, precludes players from entering the labor market altogether, and thus affects wages only in the sense that a player subject to the Rule will earn none. But the Rule itself ... does not concern wages, hours, or conditions of employment and is therefore not covered by the nonstatutory labor exemption.

App. at 28 (emphasis in original).

Having concluded that the Rule is not a mandatory subject of bargaining, the District Court could have ended its analysis. Prior to the Second Circuit's decision, no decision of this Court, or any other court, had ever found a labor-management agreement over a non-mandatory subject of bargaining eligible for immunity from antitrust scrutiny under the nonstatutory labor exemption.

Nevertheless, the District Court examined the two other

Mackey factors and found them similarly unavailing. First, the court found that the Rule "*only* affects players, like Clarett, who are complete strangers to the bargaining relationship." App. at 28 (emphasis in original). In this regard, the court stated that "[t]he labor laws cannot be used to shield anticompetitive agreements between employers and unions that affect only those outside of the bargaining unit." App. at 28.[1] While it is true that collective bargaining agreements apply to current employees as well as those entering the workforce, the District Court stated that Clarett's situation "is very different" because he is not an employee and, indeed, is not eligible for employment. App. at 29. The court observed:

> That the nonstatutory exemption does not apply in such a case is simply the flip side of the rule that the exemption only applies to mandatory subjects of collective bargaining, those governing wages, hours, and working conditions. Employees who are hired after the collective bargaining agreement is negotiated are nonetheless bound by its terms because they step into the shoes of the players who did engage in collective bargaining. But those who are categorically denied eligibility for employment, even temporarily, cannot be bound by the terms of employment they cannot obtain.

App. at 29. This reasoning is required by longstanding Supreme Court precedent on what has evolved into the first

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[1] Accord Mackey, 543 F.2d at 614 (providing that "[t]he labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship").

prong of the Mackey standard. The agreements at issue in United Mine Workers v. Pennington, 381 U.S. 657 (1965), Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797 (1945), and Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975) were all held not to be protected by the nonstatutory labor exemption because, although they directly concerned wages, hours, or terms and conditions of employment of employees, they sought "to prescribe labor standards outside the bargaining unit." Pennington, 381 U.S. 665-68. Like the small mine operators in Pennington, the non-New York City manufacturers in Allen Bradley, and the non-union subcontractors in Connell, Clarett and other similarly situated athletes, strangers to the collective bargaining relationship, are the direct and only object of the restraint.

Finally, the District Court found the nonstatutory labor exemption inapplicable because "the NFL has failed to demonstrate that the Rule evolved from arm's-length negotiations" between the NFL and the NFLPA. App. at 30. The Rule, the court observed, was adopted more than thirty years before the NFLPA was even formed and more than forty years before it became the players' exclusive bargaining agent. Indeed, the court found that the collective bargaining agreement never mentions the Rule. While the NFL attempted to rely on the NFLPA's statement that it "*waive[s]* ... its rights to bargain over any provision of the Constitution and Bylaws ... [and] to resolve any dispute ... involving the interpretation or application of the Constitution and Bylaws in accordance with the dispute resolution procedures of the CBA," the District Court read this language only to confirm that the NFLPA had merely waived its right to bargain and, consequently, that the Rule itself "was never the subject of collective bargaining between the league and the union, and did not arise from the collective bargaining process." App. at 31. Because the Rule did not evolve from the collective bargaining process, the NFL

could not shelter its anticompetitive agreement from antitrust review.

In short, the District Court concluded the Rule was not within the reach of the nonstatutory labor exemption for three separate reasons, each of which was independently sufficient to foreclose the exemption's applicability.

II.

The Second Circuit rejected each of the District Court's conclusions and found the Rule immune from antitrust challenge under the nonstatutory labor exemption because it was imposed "on a labor market organized around a collective bargaining relationship." App. at 79. Under the Second Circuit's standard, all anticompetitive agreements among employers who collectively bargain on a multiemployer basis are exempt from antitrust review if the restraint is upon a "labor" market. Indeed, under the Second Circuit's holding, it is immaterial whether the matter involves a mandatory subject of bargaining, restrains only strangers to the collective bargaining relationship, or has even been collectively bargained for at all. Rather, the mere presence of a union shelters all "labor" market restraints. This standard deviates far from the holdings of other Circuits as well as the holdings of this Court.

Like the District Court, the Second Circuit reviewed the relevant Supreme Court cases outlining the nonstatutory labor exemption, although its decision expanded the scope of the exemption far beyond anything this Court intended.

In Allen Bradley, "the New York City electrical workers union negotiated a series of agreements in which local manufacturers and contractors agreed to deal only with other manufacturers and contractors that employed the union's members." App. at 73. Allen Bradley Company, a non-New

York manufacturer, was excluded from the market by these agreements and alleged they violated the antitrust laws. App. at 73. Despite the fact that the union sought the agreements out of "a desire to get and hold jobs for themselves at good wages and under high working standards," the Supreme Court nevertheless held the nonstatutory labor exemption inapplicable. Failing to acknowledge that the anticompetitive arrangements in Allen Bradley also served to raise wages, enhanced employment opportunities for union members and thereby greatly affected the labor market, the Second Circuit found Allen Bradley applicable only "where unions 'combine with employers and with manufacturers of goods to restrain competition in, and to monopolize the marketing of, such goods.'" App. at 74.

In Pennington, "a small coal mine operator claimed that a ... union violated the antitrust laws by agreeing with large coal mine companies that the union would demand a higher wage scale from small coal mine operators in an effort to drive the small mine operators from the market." App. at 74. The Second Circuit again ignored the plain teaching of Pennington – that the anticompetitive effect of the labor-management agreement upon strangers to that collective bargaining relationship, strangers like Clarett, deprived the union and the companies of antitrust immunity despite the fact that their agreement involved wages and employment opportunities, mandatory subjects of bargaining under the NLRA. 381 U.S. 665-68.

In Local 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676 (1965), a companion case to Pennington, this Court reached a different result. There, a multi-employer group of grocery stores agreed with the union representing its butchers to limit the operation of meat counters to certain hours. Jewel Tea, one of the stores that was a signatory to the agreement, challenged the hours restriction on

antitrust grounds. Justices White and Goldberg, writing collectively for six Justices, concluded that, for the nonstatutory labor exemption to be available, the labor-management agreement at issue must be both a mandatory subject of bargaining and the product of "bona fide, arm's-length bargaining." 381 U.S. at 689-90. These two criteria, absent here, represent the second and third elements of the Mackey standard. The Second Circuit, however, read Jewel Tea to mean that only "product" market restraints are outside the reach of the exemption, a reading wholly without justification. Nowhere in Jewel Tea did this Court state that only restraints on the "product" market were outside the reach of the exemption or that restraints on the labor market were automatically insulated.[2] Indeed, under the Second Circuit's holding, the many cases in which player restraints have been challenged in situations when the players were contemporaneously represented by a union that negotiated on their behalf with teams that bargained on a multi-employer basis,[3] must have been wrongly reasoned because, under the Second Circuit's paradigm, the antitrust laws have no

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[2] In Jewel Tea, Justice White stated that application of the nonstatutory labor exemption required balancing "the interests of union members served by the restraint against its relative impact on the product market." See id. at 690 n.5. This formula, however, was designed to weigh the competing antitrust and labor law considerations at stake, not to establish that all labor market restraints fall automatically within the exemption, as the Second Circuit decided here.

[3] See, e.g., Brown, 518 U.S. at 231; Mackey, 543 F.2d at 614; McCourt, 600 F.2d at 1197-98; cf. Boris v. United States Football League, Civ. A. No. 83-4980 LEW, 1984 WL 894 (C.D.Cal. 1984); Linseman v. World Hockey Association, 439 F. Supp. 1315 (D.Conn. 1977); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D.Cal. 1971).

applicability whatsoever and are in effect extinguished under such circumstances.

In Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975), a union demanded that a contractor do business only with subcontractors employing union members, despite the fact that the union did not represent the contractor's employees and the agreement sought was not a collective bargaining contract. The contractor, which acquiesced in the demand only after the union picketed one of its sites, challenged the arrangement on antitrust grounds. This Court again denied antitrust immunity to this "kind of direct restraint on the business market [that] has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." Id. at 625.

The Second Circuit again misapplied precedent, misreading Connell to mean that only "product" market restraints fall outside the nonstatutory labor exemption. App. at 73. Connell stands for nothing of the sort. Nowhere in Connell did this Court limit its holding to "product" market restraints. In fact, Connell supports the conclusion, also present in Allen Bradley and Pennington, that it is the exclusion of strangers to the collective bargaining relationship that rendered the agreement subject to antitrust scrutiny. Clarett is no different than the subcontractors in Connell. He is an "economic actor" barred from selling his talent in the market for player services. Moreover, as in Connell, the union does not represent him.

Indeed, the Second Circuit's effort to distinguish "product" markets from "labor" markets is illusory and flies in the face of Supreme Court precedent. So-called "product" and "labor" markets are so intertwined and interconnected that they cannot be distinguished from one another. For example, in Connell, the agreement in question not only restrained

prospective subcontractors who could have bid upon jobs but for the restriction but also excluded employees of those employers who were likewise foreclosed from employment opportunities. 421 U.S. at 618-19. Likewise, in Jewel Tea, the restraint involved the stores' marketing hours. 381 U.S. at 679-80. Nevertheless, Justice White found the restriction "so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's length bargaining" was "within the protection of national labor policy and ... therefore exempt from the Sherman Act." Id. at 689-90.[4]

The Second Circuit flatly rejected the District Court's reliance on the standard announced in Mackey, stating that it had "never regarded the Eighth Circuit's test in *Mackey* as defining the appropriate limits of the non-statutory exemption." App. at 78. The court stated:

> we disagree with the Eighth Circuit's assumption in *Mackey* that the Supreme Court's decisions in *Connell, Jewel Tea, Pennington,* and *Allen Bradley* dictate the appropriate boundaries of the non-statutory exemption for cases in which the only alleged anticompetitive effect of the challenged restraint is on a labor market organized around a collective bargaining relationship.

App. at 78-79. Thus, the Second Circuit plainly acknowledged that its decision created a split among the Circuits on the critically important parameters of the exemption. Its holding

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[4] "The impact of wage costs on supply and price results in an inextricable connection between the two markets. As a result, the general objectives of the Sherman Act, ... can be frustrated by monopoly power exerted solely in the labor market." B. Meltzer, Labor Law 515 (2d ed. 1977).

directly and unabashedly contravenes the decision of the Eighth Circuit in Mackey, and the decisions of the Sixth Circuit in McCourt and the Ninth Circuit in Continental Maritime that the antitrust laws apply fully to anticompetitive agreements affecting the labor market in the context of a multi-employer collective bargaining situation. While these courts, consistent with the District Court's sound reasoning, would not allow the exemption automatically to shield plainly anticompetitive conduct that restrains the rights of prospective employees to practice their trade, the Second Circuit would invoke the exemption in every case unless it was "employers who asserted that they were being excluded from competition in the product market." App. at 79.

The Second Circuit claimed to find further support for its approach in this Court's most recent pronouncement on the reach of the nonstatutory labor exemption, Brown, a case establishing the duration of the exemption. With respect to Brown, the Second Circuit observed that "eight Justices agreed that the non-statutory exemption precludes antitrust claims against a professional sports league for unilaterally setting policy with respect to mandatory bargaining subjects after negotiations with the players union over those subjects reach impasse." App. at 85.

This case, of course, does not involve the duration of the exemption. More importantly, the plaintiff in Brown was an NFL employee and a member of the union. Clarett is neither. Instead, he is a stranger to the bargaining relationship because he is excluded from the league. Moreover, the subject at issue in Brown was wages, a mandatory subject of bargaining, while the subject here, an employment eligibility rule, is not a mandatory subject of bargaining. The subject at issue in Brown was bargained over extensively, indeed exhaustively, as demonstrated by the fact that the parties reached impasse as to that issue, while in this matter no bargaining at all took place

over the Rule.

In Brown, this Court noted that the NFL conduct at issue there "took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective-bargaining relationship." See Brown, 518 U.S. at 250. Thus, the Brown decision is grounded on the very three factors relied upon by the Eighth, Sixth, and Ninth Circuits but rejected by the Second Circuit.

The Second Circuit not only misused Brown to extend the exemption far beyond what Brown or any other case decided by this Court would sanction, it did so in defiance of this Court's clear instruction to the contrary. Indeed, the Second Circuit acknowledged that the Court in Brown had "expressed some reservations about ... the broader holding of the court of appeals that the non-statutory exemption 'waiv[es] antitrust liability for restraints on competition imposed through the collective-bargaining process so long as such restraints operate primarily in a labor market characterized by collective bargaining.'" App. at 86. But this Court expressed far more than "reservations" about an expansive interpretation of the nonstatutory labor exemption. In Brown, it wrote, "we do not interpret the exemption as broadly as did the Appeals Court." 518 U.S. at 235. This Court must firmly establish that the nonstatutory labor exemption to the antitrust laws is not nearly so broad as that envisioned by the Second Circuit and is, instead, best defined by the limits adopted by the Eighth, Sixth, and Ninth Circuits.

The Second Circuit rejected Clarett's contention, and the District Court's finding, that the Rule is not a mandatory subject of bargaining under the NLRA. The court wrote that

"the eligibility rules for the draft represent a quite literal condition for initial employment and for that reason alone might constitute a mandatory subject of bargaining." App. at 90. For this proposition, the appeals court quoted Professor Gorman's treatise Labor Law, which states, "[i]n accordance with the literal language of the Labor Act, the parties must bargain about the requirements or 'conditions' of initial employment." App. at 90. This reference, however, has nothing to do with employment eligibility, but only with the initial terms and conditions of work for employees once they are hired. In addition, the Second Circuit stated, "eligibility rules constitute a mandatory bargaining subject because they have tangible effects on the wages and working conditions of current NFL players" and "affect the job security of veteran players." App. at 90. This conclusion, aside from being wrong factually,[5] is contrary to Supreme Court and National Labor Relations Board ("NLRB") precedent on this issue.

The NLRA protects "employees" and, only under rare circumstances that are not present here, non-employees. Thus, the heart of that NLRA, Section 7, states that "employees shall have the right of self-organization, to form, join or assist labor organizations for the purpose of collective bargaining or other mutual aid or protection." See 29 U.S.C. § 157. This language is natural, of course, because the purpose of the NLRA was to grant employees the right to form unions and to bargain collectively, rather than individually. Because the NLRA grants rights to employees, labor and management must bargain only over the "wages, hours and other terms and conditions of employment" of current employees, not applicants for

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[5] As discussed infra, Clarett's eligibility for the draft would have had no effect at all on a veteran player's interest in job preservation because Clarett would simply have taken the place of the last player chosen in the draft.

employment like Clarett or retirees.

This Court and the NLRB have long held that matters exclusively concerning job applicants or former employees do not constitute mandatory subjects of bargaining. For example, in Star Tribune v. The Newspaper Guild of the Twin Cities, 295 NLRB 543 (1989), the NLRB addressed the question of whether drug testing for employment applicants was a mandatory subject of bargaining under the NLRA. There, the NLRB unambiguously declared that "[a]pplicants ... are not 'employees' within the meaning of the ... Act" and that, therefore, the issue was not a mandatory subject of bargaining under the NLRA. 295 NLRB at 556, As a consequence, the employer could unilaterally require job applicants to undergo drug screening and was not obligated to bargain with the union representing its current employees regarding that matter. See also NLRB v. United States Postal Service, 18 F.3d 1089, 1098 (3d Cir. 1994) (holding that an employer generally has no duty to bargain over practices that involve non-unit employees).

The significance of Star Tribune is illuminated by its companion case, Johnson-Bateman Co. v. International Ass'n of Machinists, 295 NLRB 180 (1989). There, the NLRB held that mandatory drug testing for current employees was a mandatory subject of bargaining and, thus, that the employer's unilateral adoption of such testing for current employees was a breach of its duty to bargain with the union in good faith over the "wages, hours, and other terms and conditions of employment" of its employees under the NLRA. See Johnson-Bateman, 295 NLRB at 180. These two cases, read together, clearly confirm that mandatory subjects of bargaining involve the wages, hours and terms and conditions of employment of current employees, not prospective employees.

Finally, in Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U. S. 157 (1971), this Court

established the parameters of the bargaining obligation under the NLRA. There, the question was whether the company was obligated to bargain with its employees' union over retirement benefits, including health insurance, for retirees. This Court's decision provided:

> Together, [Sections 1, 8(a)(5), 8(d) and 9(a)] establish the obligation of the employer to bargain collectively, 'with respect to wages, hours, and other terms and conditions of employment,' with 'the representatives of his employees' designated or selected by the majority 'in a unit appropriate for such purposes.' This obligation extends only to the 'terms and conditions of employment' of the employer's 'employees' in the 'unit appropriate for such purposes' that the union represents ... .

Pittsburgh Plate Glass, 404 U.S. at 164. In addition, this Court separately put to rest any argument that employers were obligated to bargain with the union representing their employees over persons who were not employed. This Court held:

> Section 9(a) of the [NLRA] accords representative status only to the labor organization selected or designated by the majority of employees in a 'unit appropriate' 'for the purposes of collective bargaining.' In this cause, in addition to holding that pensioners are not 'employees' within the meaning of the collective-bargaining obligations of the Act, we hold that they could not be 'employees' included in the bargaining unit.

Id. at 172.

The Second Circuit's decision contravenes Star Tribune, Johnson-Bateman, and Pittsburgh Plate Glass. Those cases illuminate the bright line drawn between those persons who are employed and those who are either not yet employed or have ceased employment. The former may exercise the rights and enjoy the protections of the NLRA while the latter may not. Mandatory subjects of bargaining do not include matters applicable only to non-employees, like Clarett, any more than they did to the prospective employees in Star Tribune or the retirees in Pittsburgh Plate Glass. Like all other employers in the United States, the NFL has no duty to bargain with the NFLPA regarding employment eligibility rules for prospective employees. Such persons are not "employees" within the meaning of the NLRA and are plainly not members of the collective bargaining unit. Therefore, the employer's bargaining obligation does not extend to matters affecting only them and questions concerning their eligibility for employment are not, and cannot be, mandatory subjects of bargaining under the NLRA.

To be sure, there are rare circumstances where rules affecting non-employees may be deemed to "vitally affect" the terms and conditions of employment of current employees and, therefore, fall within the mandatory bargaining requirement. At the same time, however, "[a]n indirect or incidental impact on unit employees is not sufficient to establish a matter as a mandatory subject. Rather, mandatory subjects include only those matters that materially or significantly affect unit employees' terms and conditions of employment." See United Techs. Corp., 274 NLRB 1069, 1070 (1985), enf'd, 789 F.2d 121 (2d Cir. 1986). No such vital effects have been demonstrated here.

Of course eligibility rules, depending on their terms, may lessen a veteran player's risk of being replaced by an

entering player, but this is always true in any employment setting because limiting access to employment will always result in greater job security for incumbent employees. Such effect alone does not, and cannot, convert employment eligibility rules into mandatory subjects of bargaining or the exception would wholly swallow the rule and, contrary to Star Tribune, render eligibility rules mandatory subjects of bargaining under all circumstances. Like eligibility rules for prospective employees, retiree benefits may also have a substantial impact on terms and conditions for current employees, but that effect, of course, did not make such benefits a mandatory subject of bargaining in Pittsburgh Plate Glass. By expanding the duty to bargain to include employment eligibility rules, the Second Circuit's opinion fundamentally alters the balance of power between employers and unions and broadens the bargaining obligation beyond anything envisioned by Congress, this Court, or the NLRB.

In any event, Clarett's eligibility would have had no effect whatsoever on the jobs of veteran players or their wages, let alone a "vital effect." The number of rounds in the NFL draft is limited to seven. Some 214 new players were drafted in the 2004 draft. Clarett's eligibility in that draft would have had no effect at all on a veteran player's interest in job preservation because Clarett would simply have taken the place of the last player chosen in the draft. Put differently, regardless of whether Clarett participated in the 2004 draft, the total number of new players eligible was fixed. Thus, Clarett's participation, or lack thereof, did not affect the job security of players already in the League, only the identity of the new players entering the League.

The Second Circuit asserted that Clarett "argues that the eligibility rules are an impermissible bargaining subject because they affect players outside of the union." App. at 92. Not true. Clarett has never taken this position. Quite to the

contrary, Clarett argues that eligibility rules are a permissive subject of bargaining. They are not "wages, hours or other terms and conditions of employment" for employees and, therefore, mandatory subjects of bargaining, but neither are they unlawful. The distinction is critical. While it is true that the draft profoundly affects players entering the unit by limiting the teams with which they may negotiate, the draft eligibility rule forecloses any employment opportunity for a class of otherwise qualified applicants. Clarett has never challenged the validity of the draft mechanism as a lawful and, indeed, mandatory subject of bargaining. Indeed, he seeks only to be part of that mechanism.

The Second Circuit cites as authority for the proposition that employment eligibility rules are mandatory subjects of bargaining the example of hiring hall arrangements in certain industries. App. at 92-93. This analogy highlights a fundamental flaw in the court's reasoning. Hiring halls exist "in certain industries – most notably maritime, longshoring and construction" where the "unions provide what is in effect a job-referral service and act as a clearinghouse between employees seeking work and employers seeking workers." See Cox, et al., Labor Law Cases and Materials (13th ed., Foundation Press 2001), 1125.

The NFLPA does not operate a hiring hall. It does not refer players for employment to NFL teams needing a player with particular skills for short-term employment. Put differently, the particular needs of employers, employees and unions which make hiring halls necessary in certain industries have no bearing on this case, and, while such arrangements constitute mandatory subjects of bargaining in those settings, nothing in this case suggests that an employment eligibility rule that excludes an otherwise qualified class of prospective employees is likewise mandatory. Instead, in this setting, like the vast majority of employment settings, the reach of the

union's bargaining authority is coextensive with the collective bargaining unit and does not include persons like Clarett who are neither employees, members of the union, nor part of the collective bargaining unit.

Indeed, in Pittsburgh Plate Glass, this Court foreshadowed, and rejected, this very argument advanced by the NFL and accepted by the Second Circuit. Rejecting the hiring hall analogy, this Court wrote,

> [t]he Board enumerated 'unfair labor practice situations where the statute has been applied to persons who have not been initially hired by an employer or whose employment has terminated. Illustrative are cases in which the Board has held that applicants for employment and registrants at hiring halls – who have never been hired in the first place – as well as persons who have quit or whose employers have gone out of business are 'employees' embraced by the policies of the Act.' ... Yet all of these cases involved people who, unlike the pensioners here, were *members of the active work force available for hire* and at least in that sense could be identified as 'employees.' No decision under the Act is cited, and none to our knowledge exists, in which an individual who has ceased work without expectation of further employment has been held to be an 'employee.'

404 U. S. at 168. So, too, a person not eligible for employment, like Clarett, is not an employee within the meaning of the NLRA.

The Second Circuit also noted that the NFL teams bargain with the NFLPA on a multi-employer basis, an entirely

permissible arrangement under the NLRA, as support for its conclusion that Clarett's position would undermine federal labor policy. The fact that employers bargain on a multi-employer basis, however, has no bearing upon the question whether an agreement among such employers and the union representing their employees is immune from antitrust scrutiny under the nonstatutory labor exemption. After all, Allen Bradley and Pennington both involved circumstances in which a group of employers, bargaining on a multi-employer basis, had reached anticompetitive arrangements with the unions representing their employees and, nevertheless, this Court reached the question of antitrust liability and, indeed, found such liability. As described earlier, Clarett does not challenge the multi-employer bargaining arrangement in professional football. The decision of the NFL and the NFLPA to bargain on that basis, however, cannot serve to insulate their anticompetitive conduct unless the other factors warranting such immunity are present. Here, not one of the factors supporting immunity is present.

Despite the fact that the rule appears nowhere in the CBA, the Second Circuit concluded that the draft eligibility rule was "well known to the union, and a copy of the Constitution and Bylaws was presented to the union during negotiations." App. at 94. Thus, the court reasoned, "the union or the NFL could have forced the other to the bargaining table if either felt that a change was warranted." First, this conclusion flows only from the court's erroneous holding that employment eligibility rules are mandatory subjects of bargaining and that management is obligated to bargain with the union representing its employees regarding the qualifications of the persons it seeks to employ. They are not mandatory subjects of bargaining and management is not so obligated. Moreover, even if such eligibility rules were mandatory subjects of bargaining, the court's holding that the conduct of the NFL and the NFLPA amounted to the level of arm's-length collective

bargaining necessary to shelter an anticompetitive agreement conflicts with the decisions of every Circuit that has considered the issue.

The correct standard is clear: there must be substantial evidence that "the parties bargained extensively over the [Rule] and that the [NFLPA] representatives concluded that it was in the best interest of the membership to agree to the [Rule] based on the concessions received from the NFL." See Zimmerman v. National Football League, 632 F. Supp. 398, 406 (D.D.C. 1986). In McCourt, as in Zimmerman, the courts applied the exemption because actual bargaining had taken place over the restraint at issue. In Mackey, as in Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 499 (E.D.P.A. 1972), the courts withheld the exemption based upon the absence of "[s]erious, intensive, arm's-length bargaining." In Zimmerman, the court focused on the details of the exchanges between the parties, and, in McCourt, the court concluded that the union had bargained ... vigorously," against the restraint at issue. Zimmerman, 632 F. Supp. at 401-03; McCourt, 600 F.2d at 1203-04.

In Mackey, on the other hand, no such bargaining took place. The restraint under scrutiny, the so-called "Rozelle Rule," had been incorporated by reference into the collective bargaining contract between the NFL and the NFLPA, and the NFL argued that this incorporation immunized the restraint from antitrust scrutiny. 543 F.2d at 610. The Eighth Circuit disagreed, however, finding that the rule was not the product of "bona fide arm's length bargaining." Id. at 616. The court reviewed the bargaining history and affirmed the district court's finding that the union had received no quid pro quo for the rule's inclusion in the collective bargaining contract.[6]

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[6] The court further held that "the union's acceptance of the

III.

At bottom, the naked restraint here falls squarely within the view of bargaining set forth in Mackey and its progeny. Indeed, in this case, there was no bargaining whatsoever, while in those cases the bargaining was merely inadequate. For this reason, the District Court properly observed that the record "is peculiarly sparse in establishing the evolution of the rule. Indeed, what the record omits speaks louder than what it contains." App. at 30. The court thus determined that the Rule was not the product of arm's-length collective bargaining. On the same record, the Second Circuit held this evidence sufficient under Jewel Tea to invoke the exemption, virtually eliminating any requirement that the challenged agreement be the product of bona fide arm's-length bargaining. By eliminating actual bargaining as a requirement for invocation of the exemption, the Second Circuit again parted ways, and created a split in the Circuits, as to the role of actual bargaining in the invocation of the exemption.

The Second Circuit's decision as to the reach of the nonstatutory labor exemption is breathtaking. It requires Supreme Court review and rejection. Left standing, it would permit any and all anticompetitive agreements among employers restraining trade in the market for labor, so long as their employees are represented by a union with which they collectively bargain on a multi-employer basis. Indeed, under the Second Circuit's analysis, it would be immaterial whether or not the agreement involved a mandatory subject of bargaining, primarily affected only strangers to the collective bargaining arrangement, or was unilaterally imposed by the employers and not the product of arm's-length collective

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status quo by the continuance of the Rozelle Rule in the initial collective bargaining agreements ... [could not] serve to immunize the Rozelle Rule from the scrutiny of the Sherman Act." See id. at 616.

bargaining. The mere presence of a union, coupled with a multi-employer bargaining arrangement, would shelter any anticompetitive arrangements regarding labor. Nothing in American law suggests that policies underlying labor law warrant such a sweeping repeal of the antitrust laws.

The Second Circuit's decision, of course, does not address the District Court's conclusion that the Rule under challenge is a wholesale restraint on free economic competition. Instead, it permits the NFL to maintain the Rule upon the premise that the labor law principles at stake are so compelling that they extinguish any application of the antitrust laws. While the Supreme Court has granted limited antitrust immunity where labor and management agree through the collective bargaining process to restrain themselves as to "wages, hours and other terms and conditions of employment" for employees, it has never done so under any circumstances like those presented here.

This Court should preserve the delicate balance it has previously struck between conflicting national policies of free economic competition and protecting the rights of employees to bargain collectively. The decision of the Second Circuit has so fundamentally altered that balance that this Court must grant review.

Interest in this issue is of such exceptional importance that Representative John L. Conyers, Jr., of the Committee on the Judiciary United States House of Representatives, filed an amicus curiae brief in support of Clarett with the Circuit. Representative Conyers wrote:

> As the Ranking Democrat on the House Judiciary Committee, amicus has an overriding interest in preserving and protecting the antitrust laws. Amicus is concerned that the

> non-statutory labor exemption not be extended in a manner that would undermine the integrity of the antitrust laws or intrude on Congress' traditional purview in enacting such laws. In addition, amicus believes that Clarett, who has been foreclosed from being able to seek employment in the NFL, is precisely the type of party Congress envisioned being able to seek relief under the antitrust laws.

App. at 99.

This Honorable Court should grant Clarett review of the Second Circuit's decision not only because it is simply wrong, but also because it reflects a complete failure to follow this Court's teachings in Allen Bradley, Pennington, Connell, and Brown and so conflicts with the decisions of other Circuits as to create out of a narrow exemption not just a "cat's paw," but a lion's broad swath.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant the writ of certiorari.

Dated: 12/27/04

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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

Maurice Clarett,

Petitioner,

v.

National Football League,

Respondent.

On Petition For Writ Of Certiorari
To The Second Circuit Court Of Appeals

APPENDIX TO THE PETITION

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MAURICE CLARETT,	:	**OPINION AND ORDER**
Plaintiff,	:	03 Civ. 7441 (SAS)
- against -	:	
NATIONAL FOOTBALL LEAGUE,	:	
Defendant.	:	

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

Maurice Clarett's goal is to play in the National Football League next year. The only thing preventing him from achieving that goal is the League's rule limiting eligibility to players three seasons removed from their high school graduation. The question before the Court is whether this Rule violates the antitrust laws.

Clarett, a star freshman football player attending The Ohio State University, now in his sophomore year, challenges the Rule, claiming that he is ready, willing and able to play in the NFL and that his exclusion violates the antitrust laws. Clarett's challenge to the Rule raises serious questions arising at the intersection of labor law and antitrust law, not to mention the intersection of college football and professional football. Should Clarett's right to compete for a job in the NFL – the only serious pro football game in town – trump the NFL's right to categorically exclude a class of players that the League has

decided is not yet ready to play?

The answer requires the Court to tackle a number of technical legal issues. The NFL defends itself by asserting three arguments: (1) the Rule is the result of a collective bargaining agreement between the NFL and the players union and is therefore immune from antitrust scrutiny; (2) Clarett has no standing under the antitrust laws to bring this suit; and (3) the Rule is reasonable.

While, ordinarily, the best offense is a good defense, none of *these* defenses hold the line. Because the Rule does not concern a mandatory subject of collective bargaining (wages, hours and conditions of employment), governs only non-employees, and did not clearly result from arm's length negotiations, it is not immune from antitrust scrutiny. Clarett has standing to sue because his injury flows from a policy that excludes all players in his position from selling their services to the only viable buyer – the NFL. Finally, the NFL has not justified Clarett's exclusion by demonstrating that the Rule enhances competition. Indeed, Clarett has alleged the very type of injury – a complete bar to entry into the market for his services – that the antitrust laws are designed to prevent. It is axiomatic, in the words of Learned Hand, that the antitrust laws will not tolerate a contract "which unreasonably forbids any one to practice his calling."[1]

Because the NFL cannot prevail on any of these defenses, the Rule must be sacked.

II. UNDISPUTED FACTS AND PROCEDURAL POSTURE

The facts of this dispute are easily recounted and

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[1] *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949).

essentially undisputed, unless otherwise noted. Clarett, a college football player, is suing the NFL under the Sherman Antitrust Act,[2] asserting that the League's Rule limiting eligibility for the draft to players three seasons removed from their high school graduation constitutes an unreasonable restraint of trade.

A. The NFL and the Collective Bargaining Agreement

The NFL began operating in 1920 as the American Professional Football Association, comprised of twenty-three member clubs.[3] The current NFL is an unincorporated association of thirty-two member clubs.[4] Although there are other professional football leagues in North America – including the Arena Football League, the Arena Football League 2, the National Indoor Football League, and the Canadian Football League[5] – the NFL dominates. It consistently outperforms all other professional *sports* leagues, not to mention the other professional football leagues, in both revenues and television ratings.[6] The Super Bowl – the

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[2] 15 U.S.C. § 1 *et seq.*

[3] *See American Football History*, at http:// wiwi.essortment.com/americanfootbal_rwff.htm

[4] See 11/20/03 Second Declaration of Peter Ruocco ("Ruocco Decl.") ¶ 2. Peter Ruocco is the Senior Vice-President of Labor Relations of the NFL Management Council and was personally involved in the 1993 collective bargaining. *See id.* ¶ 1.

[5] *See id.* ¶ 10.

[6] According to one economist, the NFL, as a league, is valued at slightly less than $18 billion. The National Basketball Association, the next most valuable league, is valued at slightly less than $9 billion, Major League Baseball at approximately $7 billion, and the National Hockey League at less than $5 billion. At $19.6 billion, the NFL's television contracts (the sale of the rights to air its games) are more than the value of the NBA ($4.6 billion), MLB

League's championship game – is routinely the top-rated television program of the year,[7] and indeed, four of the top ten highest-rated programs in television history are NFL football games.[8]

Not surprisingly, the League's fiscal success also inures to the benefit of its players. The average NFL player earned $1,258,800 in 2003;[9] the average starting NFL running back (which Clarett aspires to be) earned $1,578,275;[10] the average first-round draft choice (which Clarett also aspires to be) earned

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($3.3 billion), and NHL ($600 million) television contracts combined. *See* Justin Wolfers, *The Business of Sports: Where's the Money?*, at http://faculty-gsb.stanford.edu/wolfers/Papers/Comments/The% 20Business% 20of% 20Sports.pdf.

[7] See *Super Bowl Scores Big With Viewers*, at http:// cbsnews.cbs.com/stories/2003/01/27/entertainment/main538085.shtml (Jan. 27, 2003) ("The Super Bowl is often the most-watched TV program each year...."). Most recently, almost 90,000,000 Americans watched Super Bowl XXXVIII, held on February 1, 2004. *See Top Ten Primetime Broadcast TV Programs For Week of 1/26/04-2/1/04* (Feb. 3, 2004), at http://www.nielsenmedia.com.

[8] *See Top 10 Network Telecasts of All Time (Ranked By Household Rating), available at* http://www.nielsenmedia.com/. The only other sporting event in the top ten television programs was the showdown between Nancy Kerrigan and Tonya Harding at the 1994 Olympic Games in Norway. The other entrants on the top ten list include the final episode of M*A*S*H (number one all-time), the "Who Shot J.R.?" episode of *Dallas* (two), the final installment of *Roots* (three), and a two-part serialization of *Gone With the Wind* (eight and nine). *Id.*

[9] *See* M.J. Duberstein, *2003 Season Omnibus NFL Salary Averages & Trends: Volume One–2003 Season Salary Averages* (NFLPA Research Dep't 2004), *at* http:// www.nflpa.org/PDFs/Shared/2003_Season_Salary_&_Signing_Trends_Omnibus_January_2004.pdf.

[10] *Id.* at 3.

$1,367,120;[11] the *minimum* salary that a rookie may be paid is $225,000.[12] In contrast, the 2000 salary cap in the Canadian Football League – the total amount of money that a team was permitted to pay to all 50-odd of its players *combined* – was approximately $1,700,000.[13] Similarly, the 2003 team salary cap in the Arena Football League was $1,643,000.[14] In other words, the average starting running back in the NFL makes only slightly less than the average *teams* do in the CFL and AFL. In short, the NFL represents an unparalleled opportunity for an aspiring football player in terms of salary, publicity, endorsement opportunities, and level of competition.

Day-to-day operation of the League is handled by an appointed Commissioner, currently Paul Tagliabue.[15] Representatives of each of the thirty-two teams, however, comprise the National Football League Management Council ("NFLMC"), the exclusive collective bargaining representative of the League.[16] The 1,400-odd NFL players are exclusively represented by the National Football League Players Association ("NFLPA"),[17] which was created in 1956.[18] In

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[11] *Id.* at 99.

[12] *See* http://www.nationmaster.com/encyclopedia/American-Professional-Football-Association

[13] *See Canadian Football League Players Association, Collective Bargaining in the 1990s, at* http://www.cflpa.com/CFLPA/history_1990s.html. The year 2000 team salary cap was set at approximately $2,280,000 Cdn., which converts to roughly $1,700,000 at the current 1:.7472 exchange rate. *See generally* http://www.bankofcanada.ca/en/exchform.htm.

[14] *See AFL/AFLPA CBA Term Sheet* (Oct. 14, 2003), *available at* http://www.aflplayers.org/documents/AFLtermsheet.pdf.

[15] Tagliabue has been Commissioner of the NFL since 1989. *See NFL History: 1981-1990, at* http://www.nfl.com/history/chronology/1981-1990.

[16] *See* Ruocco Decl. ¶ 2.

[17] *See id.* ¶ 7.

1968, the NFLPA and the NFLMC entered into the League's first Collective Bargaining Agreement ("CBA").[19]

The current CBA took effect on May 6, 1993, and expires in 2007.[20] The CBA, along with the League's Constitution and Bylaws, comprehensively outlines the relationship between the players and the League, covering the operation of the League, player salary and the player draft, including detailed rules by which the teams select new players. Two provisions of the CBA are at issue here. Article III, section 1, provides:

> This Agreement represents the complete understanding of the parties on all subjects covered herein, and there will be no change in the terms and conditions of this Agreement without mutual consent.... [T]he NFLPA and the Management Council *waive all rights to bargain with one another concerning any subject covered or not covered in this Agreement* for the duration of this Agreement, *including the provisions of the NFL Constitution and Bylaws....*[21]

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[18] *See generally* http://www.nflpa.org/.

[19] *See Smith v. Pro-Football*, 420 F.Supp. 738, 741 (D.D.C. 1976) ("As of March 5, 1968, the National Football League Players Association became the exclusive bargaining agent and representative of the NFL players. This union executed its first collective bargaining agreement with the NFL owners in November of 1968 ...."), *aff'd in part and rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978).

[20] *See* Ruocco Decl. ¶ 7. The CBA appears to have been amended (presumably not in a material way) as recently as January 8, 2002. *See* Ex. D to Ruocco Decl.

[21] *See* Ex. D to Ruocco Decl. (emphasis added).

Article IV, section 2, entitled "No Suit," provides:

> [N]either the NFLPA nor any of its members, agents acting on its behalf, nor any members of its bargaining unit will sue, or support financially or administratively any suit against, the NFL or any Club relating to the presently existing provisions of the Constitution and Bylaws of the NFL as they are currently operative and administered....[22]

Clarett and the NFL disagree on whether these two provisions establish that the NFL and the players union actually bargained over the terms of the Constitution and Bylaws (which contained the eligibility Rule at issue), or merely bargained away the NFLPA's ability to bargain over or challenge the Bylaws' provisions.[23]

B. The Rule

The NFL's eligibility Rule precluding college underclassmen from participating in the draft has been in force – in one form or another – for decades.[24] "It was adopted after

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[22] *See* Ex. E to Ruocco Decl.

[23] The NFL also points to Article IX of the CBA, in which the NFLPA and NFLMC agree to resolve any dispute they may have involving the interpretation or application of the CBA, the Constitution, or the Bylaws in accordance with the CBA's grievance procedure. *See id.*, Ex. F. The existence of Article IX proves only that the parties bargained over a grievance procedure, not that they bargained over the Constitution and Bylaws themselves.

[24] *See* Robert A. McCormick & Matthew C. McKinnon, *Professional Football's Draft Eligibility Rule: The Labor Exemption and the Antitrust Laws*, 33 *Emory L.J.* 375, 377 & n. 12 (1984) (tracing the origin of the Rule to 1925).

Illinois's star running back, Harold 'Red' Grange, stunned the sports world by leaving school at the end of the 1925 college season and joining the Chicago Bears of the five-year-old NFL for a reported $50,000."[25] The original Rule precluded a player from joining the NFL unless four seasons had elapsed since his high school graduation; in 1990, the requirement was changed to three seasons.[26]

Notwithstanding the fact that the Rule predates the CBA, the NFL maintains that "[d]uring the course of collective bargaining that led to the 1993 CBA, the eligibility rule itself was the subject of collective bargaining."[27] On May 6, 1993 – the same day that the current CBA became effective – the NFLPA and the NFLMC also executed a side letter acknowledging that the Constitution and Bylaws attached to the letter were referenced in the CBA.[28] Among the various

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[25] Charles Lane, *Clarett Lines Up Against NFL*, *Wash. Post*, Jan. 23, 2004, at D1. *See generally* Benjamin G. Rader, American Sports (1993) ("In 1925 Grange's decision touched off a national debate. By abandoning his studies for a blatantly commercial career, he openly flaunted the myth of the college athlete as a gentleman-amateur who played merely for the fun of the game and the glory of his school. Grange's Illinois coach, Zup Zuppke, joined a host of academics in condemning Grange. Not only was professional football held in low moral esteem, but to them it was unethical for Grange to capitalize upon a reputation that he had acquired in college for direct, personal gain.").

This information is provided by way of background only. The record before the court only evidences that the rule is more than 50 years old and predates the CBA and the formation of the NFLPA. *See* Transcript, *Clarett v. National Football League*, 03 Civ. 7441 (S.D.N.Y. Sept. 30, 2003) ("Tr.") at 12 ("Previous forms of this rule go back ... 50 years") (statement of Gregg Levy, counsel to the NFL).

[26] *See* Lane, *Clarett Lines Up Against NFL*.

[27] Ruocco Decl. ¶ 8.

[28] *See* Ex. G to Ruocco Decl.; *see also* Ex. A to Ruocco Decl. (the

provisions of the 1993 Bylaws are comprehensive rules describing who is eligible to play in the NFL. The Bylaws provided that a player became eligible if he exhausted his eligibility to play college football or graduated from college.[29] A player was also eligible if he was five years removed from his first enrollment in college (or four years removed, if he never played college football), regardless of whether he had any remaining college eligibility.[30] Finally, a player not otherwise eligible could be granted "Special Eligibility."[31]

> Such a player has been granted eligibility through special permission of the Commissioner. In order to receive consideration for the League's principal college draft in any year, any application for special eligibility must be in the Commissioner's office no later than January 6 of that year. For college football players seeking special eligibility, *at least three NFL seasons must have elapsed since the player was graduated from high school.*[32]

Although by its plain language the Rule requires the "special permission" of the Commissioner, that permission appears to be routinely granted where a player falls within the ambit of the Rule (*i.e.*, is clearly three years removed from his high school graduation).[33]

"Bylaws").

[29] *See* Bylaws §§ 12.1(A)-(B).

[30] *See id.* §§ 12.1(C)-(D).

[31] *See id.* § 12.1(E).

[32] *See id.* § 12.1(E) (emphasis added).

[33] *See, e.g., 41 Authorized to Leave Early for the Draft, Milwaukee J. Sentinel*, Jan. 20, 2004, at 3C. Where it is unclear whether a

In 2003, the form of the Rule changed yet again when the NFLMC promulgated revised Bylaws.[34] The record is unclear as to whether these new Bylaws were the subject of collective bargaining, although Article III, section 1 of the CBA requires the NFLMC and NFLPA to negotiate in good faith any changes that "could significantly affect the terms and conditions of employment of NFL players."[35]

Under the 2003 version of the Bylaws, the Rule is omitted altogether. In its place is a reference to a separate memorandum promulgated by the Commissioner under section 8.5 of the Bylaws.[36] Section 8.5, in turn, provides that "[t]he Commissioner shall interpret and from time to time establish policy and procedure in respect to the provisions of the Constitution and Bylaws and any enforcement thereof."[37] Thus, under the 2003 Bylaws, the Rule now exists only as

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player qualifies for special eligibility, however, the Commissioner has a modicum of discretion. For example, the Commissioner is currently considering the application of University of Pittsburgh wide receiver Larry Fitzgerald. Fitzgerald, like Clarett, is completing his sophomore year of college. But unlike Clarett, Fitzgerald spent a year at a prep school between high school and college. According to press reports, the Commissioner is expected to declare Fitzgerald eligible but is apparently delaying until after this Court rules on the instant motions because it "does not want to complicate matters for the judge in the Clarett case." *Fitzgerald Announcement Likely a Formality* (Feb. 1, 2004), *at* http://sports.espn.go.com/ncf/news/story?id=1724779.

[34] *See* Bylaws.

[35] *See* Ex. D to Ruocco Decl.

[36] *See* Bylaws (providing the following citation after section A of "General Rules of Eligibility": "See NFLNet Memorandum, February 16, 1990, establishing policy and procedure pursuant to Article VIII, Section 8.5, permitting college players to apply for special draft eligibility if at least three football seasons have elapsed since their graduation from high school, App., p.1990-4.").

[37] *See* Ex. B to Ruocco Decl.

"policy and procedure" established by the Commissioner and cited in the Bylaws. With respect to the 2004 draft, the Commissioner has issued a release that includes the following iteration of the Rule:

> **SPECIAL ELIGIBILITY.** Such player has been granted eligibility through special permission of the Commissioner. Any applications for special eligibility must be in the Commissioner's office no later than Thursday, January 15, 2004, if the player is to be considered for inclusion in the League's principal draft scheduled for April 24-25, 2004. Applications will be accepted only for college players for whom at least three full college seasons have elapsed since their high school graduation. Players will not be permitted to elect to bypass the January 15 deadline in order to seek eligibility for a later supplemental draft, and no supplemental draft will be held to accommodate such an election.[38]

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[38] *See* National Football League Eligibility Rules (emphasis added), Ex. D to Plaintiff's Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment ("Clarett Reply"). While there is no independent authentication of this document, the Bates stamp reflects that it was produced by the NFL.

The Rule as it exists in the Commissioner's memorandum requires a player to be three full *college* seasons removed from his high school graduation, while the Rule contained in Section 12.1(E) of the 1993 Bylaws required a player to be three NFL seasons removed from high school. In fact, the NFL and college seasons are nearly coterminous, and the Commissioner has interpreted the Rule in the same way since the 1991 draft. *See* Ex. D to Clarett Reply (containing the Commissioner's memoranda regarding draft eligibility for every year between the 1991 and 2004 draft, all of which refer to "three full college seasons").

It is this version of the Rule that Clarett challenges.

The NFL provides a number of justifications for the Rule, arguing that it protects at least four different classes of people. *First*, the NFL contends that the Rule protects the people it excludes because they "are not sufficiently mature, either physically or psychologically, to endure the rigors of professional football."[39] *Second*, the Rule protects member clubs who might suffer financial adversity resulting from younger players' peculiar susceptibility to injury.[40] *Third*, the Rule protects the League and its "entertainment product from the adverse consequences associated with such injuries."[41] *Fourth*, the Rule protects young players who, if they declare but are not drafted, would lose their eligibility to play college football,[42] or who might over-train or experiment with performance-enhancing drugs to speed their athletic development.[43]

C. Maurice Clarett

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[39] *See* Ruocco Decl. ¶ 5. *See also* Declaration of Jordan D. Metzl, M.D. ("Metzl Decl.") (attesting to the medical reasonableness of the Rule).

[40] *See* Ruocco Decl. ¶ 5. *See also* Memorandum of the National Football League (1) in Opposition to Plaintiff's Motion for Summary Judgment and (2) in Support of the NFL's Cross-Motion for Summary Judgment (Non-Statutory Labor Exemption) ("NFL Mem.") at 4 (arguing that the Rule "protect[s] the NFL clubs from the costs and potential liability entailed by such injuries").

[41] NFL Mem. at 4.

[42] *See* Ruocco Decl. ¶ 6. Once a player makes himself available to be drafted into the NFL, he sacrifices any remaining collegiate football eligibility under the rules of the National Collegiate Athletic Association ("NCAA").

[43] *See* Metzl Decl. ¶ 16.

Clarett, now twenty years old,[44] graduated high school on December 11, 2001.[45] His credentials as a football player are impressive. In the 2002-2003 collegiate season, Clarett – the first freshman starter at running back for The Ohio State University ("OSU") since 1943[46] – led his team to an undefeated (14-0) season that was capped by a 31-24 double-overtime victory over University of Miami in the Fiesta Bowl, OSU's first national championship in thirty-four years.[47] As a result of his freshman year resounding success, Clarett was named the Big Ten Freshman of the Year and voted the best running back in college football by *The Sporting News*.[48]

Clarett claims that he wanted to declare for the April

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[44] *See* Affidavit of Maurice Clarett ("Clarett Aff.") ¶ 4, Ex. A to the Declaration of Alan C. Milstein ("Milstein Decl."), counsel to Clarett.

[45] *See id.* ¶ 6.

[46] *See id.* ¶ 7.

[47] *See id.* ¶ 10. *See generally Clarett Finds Way to Hurt "Canes in Clutch"* (Jan. 4, 2003), *at* http:// espn.go.com/ncf/bowls02/s/fiesta_ clarettclutch.html. In the Fiesta Bowl, Clarett rushed for 47 yards and 2 touchdowns –including the winning score in double-overtime. *See* http:// sports.espn.go.com/ncf/boxscore? gameId=230032390.

[48] *See* Clarett Aff. ¶ 11. The Big Ten is a collegiate athletic conference that includes eleven schools: University of Illinois, Indiana University, University of Iowa, University of Michigan, Michigan State University, University of Minnesota, Northwestern University, OSU, The Pennsylvania State University, Purdue University and University of Wisconsin. In the 2002-2003 season, when Clarett was named Big Ten Freshman of the Year, the Big Ten was a particularly competitive conference, with OSU, Iowa, Michigan and Penn State all finishing among the top fifteen teams in the three major college football rankings (the Bowl Championship Series, Associated Press poll, and USA Today/ESPN poll). *See* http://espn.go.com/abcsports/bcs/rankings/.

2003 NFL draft after his strong freshman season,[49] but offers no explanation as to why he did not challenge the Rule at that time. Clarett's status changed in September 2003, however, when OSU and the NCAA suspended him for the entire 2003-2004 season.[50] As a result, he did not play during the just-concluded college football season. Moreover, there appears to be some question as to whether the NCAA will permit him to play in the 2004-2005 season.[51] Clarett's decision to seek eligibility for the 2004 draft may have resulted, in part, from this suspension. The NFL may be his only real option for playing football next year.

Clarett, who is six feet tall and weighs 230 pounds,[52] is taller and heavier than some of the NFL's all-time greatest running backs, including Walter Payton (5'10", 200), Barry Sanders (5'8", 203) and Emmitt Smith (5'9", 207).[53] While sportswriters disagree about which team would draft him and in which round, there seems to be little doubt that Clarett is an NFL-caliber player who would be drafted if he were eligible to

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[49] *See* Clarett Aff. ¶ 12.

[50] *See generally* Rusty Miller, *Clarett Suspended for 2003 for 16 NCAA Violations* (Sept. 10, 2003), *available at* http://www.usatoday.com/spor ts/college/football/bigten/2003-09-10-clarett-suspension_x.htm.

[51] *See* Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment ("Clarett Mem.") at 9.

[52] *See id.*

[53] *See* Bob Carroll, et al., eds., Total Football II: The Official Encyclopedia of the National Football League (1999), Ex. H. to Milstein Decl. Although size is not always an asset to a running back, *see* Bob Glauber, Clarett No Lock for First Round, Newsday, Sept. 28, 2003, at B7, some of the greatest running backs have also been larger than Clarett (e.g., Hall of Famers Jim Brown (6'2", 232) and Larry Csonka (6'3", 240)). *See* Jim Brown, at http:// www.clevelandbrowns.com/history/hof_brownj.php; Biography, at http://www.larrycsonka.com/bio/.

participate in the process.[54] Thus, only the Rule stands between Clarett and the opportunity to play in the NFL next year.[55]

D. Procedural History

This case has progressed rapidly, virtually rushing toward the goal line because of the imminence of the 2004 draft. Clarett filed suit on September 23, 2003. At the initial scheduling conference, held one week later, both parties informed the Court that they intended to move for summary judgment. After limited document discovery, the parties' cross-motions for summary judgment were fully submitted on December 11, 2003. In two separate motions, the NFL asks for summary judgment on its defenses that (1) the Rule is protected

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[54] *Compare* Michael Wilbon, *For Clarett, It's a Bad Move*, *Wash. Post*, Sept. 25, 2003, at D1 (questioning whether Clarett is worthy of a top pick in the NFL draft) *with* Bob Glauber, *Clarett Sues NFL for Right to Enter Draft*, *Newsday*, Sept. 24, 2003, at A60 (reporting that "according to several league executives," if Clarett were in the 2004 draft, "it's likely he would be a first-round choice."). *See also* Complaint ("Compl.") ¶ 31 ("Had Clarett been eligible for the 2003 Draft, it is almost certain he would have been selected in the beginning of the First Round and would have agreed to a contract and signing bonus worth millions of dollars.").

[55] Clarett argues that he actually is eligible under the Rule. Even if that question were properly before the Court – which it is not – it seems plainly incorrect under the current version of the Rule, which requires three full college football seasons to have elapsed since a player's high school graduation. A college football season runs from roughly late August (OSU played its first game this past year on August 30) to early January, if bowl games are included (OSU played its final game on January 2), or late November if they are not (OSU played its final regular season game on November 22). Clarett graduated high school in December 2001. Thus, only two full college seasons have elapsed since his graduation: the season running from August 2002 to January 2003, and the season running from August 2003 to January 2004.

from antitrust scrutiny by the nonstatutory labor exemption; and (2) Clarett lacks antitrust standing. Clarett, in turn, seeks summary judgment on his single antitrust claim. The NFL opposes Clarett's motion, claiming that if the suit is not dismissed on the grounds set forth in its motions, a trial is needed to determine whether the Rule is a reasonable restraint of trade.

III. LEGAL STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[56] "An issue of fact is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'"[57] A fact is material when it "'might affect the outcome of the suit under the governing law.'"[58]

A party seeking summary judgment has the burden of demonstrating that no genuine issue of material fact exists.[59] In turn, to defeat a motion for summary judgment, the non-moving party must raise a genuine issue of material fact. To do so, he

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[56] Fed.R.Civ.P. 56(c). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

[57] *Electrical Inspectors, Inc. v. Village of East Hills*, 320 F.3d 110, 117 (2d Cir.2003) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)), *cert. denied sub nom. Village of Islandia v. Electrical Inspectors, Inc.*, 540 U.S. 982, 124 S.Ct. 467, 157 L.Ed.2d 373 (2003).

[58] *Id.* (quoting *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505).

[59] *See Apex Oil Co. v. DiMauro*, 822 F.2d 246, 252 (2d Cir.1987) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)).

"must show more than a 'metaphysical doubt' as to material facts,"[60] and he may not rely on conclusory allegations or unsubstantiated speculation.[61] Rather, the non-moving party must produce admissible evidence that supports his pleadings.[62] In this regard, "[t]he 'mere existence of a scintilla of evidence' supporting the non-movant's case is also insufficient to defeat summary judgment."[63]

In determining whether a genuine issue of material facts exists, the court must construe the evidence in the light most favorable to the non-moving party and draw all inferences in that party's favor.[64] Accordingly, the court's task is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."[65] Summary judgment is therefore inappropriate "if there is any evidence in the record that could reasonably support a jury's verdict for the non-moving party."[66] Nonetheless, the Second

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[60] *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986))

[61] *See Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568 (2d Cir.1990) (holding that "[c]onclusory allegations will not suffice to create ... a genuine issue" of material fact sufficient to overcome a motion for summary judgment); *see also Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 428 (2d Cir.2001).

[62] *See First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 289-90, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968).

[63] *Niagara Mohawk Power Corp. v. Jones Chem. Inc.*, 315 F.3d 171, 175 (2d Cir.2003) (quoting *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505). See also *Twin Labs.*, 900 F.2d at 568 ("There must be more than a scintilla of evidence, and more than some metaphysical doubt as to the material facts.") (quotation marks and citations omitted).

[64] *Niagara Mohawk*, 315 F.3d at 175 (citing *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505).

[65] *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505.

[66] *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 286 (2d

Circuit has remarked that "[i]n the context of antitrust cases ... summary judgment is particularly favored because of the concern that protracted litigation will chill pro-competitive market forces."[67]

IV. DISCUSSION

Clarett is suing the NFL under section 1 of the Sherman Antitrust Act[68] and section 2 of the Clayton Act.[69] He alleges that the Rule is an illegal restraint of trade because the teams have agreed to exclude a broad class of players from the NFL labor market, thereby constituting a "group boycott."[70] In

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Cir.2002) (emphasis added) (citing *Pinto v. Allstate Ins. Co.*, 221 F.3d 394, 398 (2d Cir.2000)). *See also Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 188 (2d Cir.1992) (Thurgood Marshall, J., retired and sitting by designation).

[67] *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 104 (2d Cir.2002). *See also Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 541 (2d Cir.1993).

[68] 15 U.S.C. § 1. The Sherman Act prohibits "[e]very contract, combination ... or conspiracy, in restraint of trade." *Id.*

[69] Private plaintiffs cannot sue directly under the Sherman Act. Rather, section 2 of the Clayton Act creates a private right of action for "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." *Id. § 15.*

[70] *See* Compl. ¶¶ 32-43. "Group boycotts ... generally consist of agreements by two or more persons not to do business with other individuals, or to do business with them only on specified terms." *Balaklaw v. Lovell*, 14 F.3d 793, 800 (2d Cir.1994); *see also Haywood v. National Basketball Ass'n*, 401 U.S. 1204, 1206, 91 S.Ct. 672, 28 L.Ed.2d 206 (1971) (Douglas, J.) (describing a similar age-based eligibility restriction in the NBA as posing a "significant" "group boycott issue in professional sports"). Group boycotts are also sometimes referred to as "concerted refusals to deal." *See* 13 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 2200 (2000).

order to prevail on that claim, Clarett must demonstrate that he is entitled to judgment on the merits. However, he must first overcome the two affirmative defenses asserted by the NFL: (1) that the Rule is immune from the antitrust laws, and (2) that Clarett lacks standing to bring an antitrust claim.

A. The Nonstatutory Labor Exemption

The NFL argues that the Rule is immune from antitrust scrutiny based on what has come to be known as the "nonstatutory labor exemption." If the NFL is correct, the exemption provides a complete defense to Clarett's suit. Accordingly, I address the application of the nonstatutory labor exemption at the outset.

1. Purpose and Background of the Nonstatutory Labor Exemption

In order to answer the question of whether the Rule is subject to the antitrust laws, a brief discussion of the labor exemptions – which collectively immunize otherwise anticompetitive conduct from antitrust scrutiny – is required. The statutory exemptions, contained in provisions of the Clayton Act[71] and the Norris-LaGuardia Act,[72] exempt certain activities engaged in by labor unions.[73] The nonstatutory exemption, created by the courts, was designed to favor labor law over antitrust law by permitting collective bargaining

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[71] *See* 15 U.S.C. § 17; 29 U.S.C. § 52.

[72] *See* 29 U.S.C. §§ 104, 105, 113.

[73] *See Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621-22, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975). The statutory exemption immunizes traditional union conduct – such as boycotts and secondary picketing – that would otherwise unquestionably qualify as concerted action in restraint of trade. *See, e.g., United States v. Hutcheson*, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 (1941).

between unions and employers over wages, hours and working conditions. Because the Rule is not covered by the statutory exemption, it is subject to the antitrust laws unless the nonstatutory labor exemption applies.[74]

The Supreme Court has "implied this [nonstatutory] exemption from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining, *which require good-faith bargaining over wages, hours, and working conditions* ... ."[75] Thus, the Court recognized the primacy of collective bargaining in the workplace, even when the agreements reached through that bargaining would otherwise violate the antitrust laws' prohibition on combinations in restraint of trade:

> As a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other any of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable. Thus, the implicit exemption recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition *imposed through the bargaining process* must be shielded from

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[74] *See id.* at 622, 95 S.Ct. 1830 (citing *Local Union No. 189, Amalgamated Meat Cutters, and Butcher Workmen of N. Am. v. Jewel Tea Co.*, 381 U.S. 676, 85 S.Ct. 1596, 14 L.Ed.2d 640 (1965)).

[75] *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236, 116 S.Ct. 2116, 135 L.Ed.2d 521 (1996) (emphasis added, citations omitted).

antitrust sanctions.[76]

While the Second Circuit has not adopted a test that controls the application of the nonstatutory labor exemption, three other circuits have. The Sixth, Eighth and Ninth Circuits have looked to the following three-factored test:

> First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily *affects only the parties to the collective bargaining relationship.* Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted *concerns a mandatory subject of collective bargaining.* Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the *product of bona fide arm's-length bargaining.*[77]

In a more recent case, the Second Circuit acknowledged the test promulgated by the Eighth Circuit, but preferred to apply the simple formulation enunciated by the Supreme Court in *Local Union No. 189 v. Jewel Tea Co.* In doing so, the Second Circuit held that the appropriate test is "one that balances the conflicting policies embodied in the labor and

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[76] *Id.* at 237, 116 S.Ct. 2116 (second emphasis added); *see also id.* at 254, 116 S.Ct. 2116 (Stevens, J., dissenting).

[77] *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir.1976) (emphasis added; citations and footnotes omitted); *accord Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades District Council*, 817 F.2d 1391, 1393 (9th Cir.1987); *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1197-98 (6th Cir.1979).

antitrust laws, with the policies inherent in labor law serving as the first point of reference."[78]

First, the agreement at issue must further goals that are protected by national labor law and that are within the scope of traditionally mandatory subjects of collective bargaining. Second, the agreement must not impose a "direct restraint on the business market [that] has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions [that result from collective bargaining agreements]."[79]

Thus, because the labor laws only require collective bargaining as to certain subjects, and the nonstatutory labor exemption was designed to shield from antitrust scrutiny conduct that is *mandated* under the labor laws, the exemption is limited to policies that affect "traditionally mandatory subjects of collective bargaining."[80]

2. The Scope of the Nonstatutory Labor Exemption

Under the National Labor Relations Act, mandatory

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[78] *Local 210, Laborers' Int'l Union of N. Am. v. Labor Relations Div. Associated Gen. Contractors of Am.*, 844 F.2d 69, 79 (2d Cir.1988); *see also id.* at 80 n. 2 ("Although we believe that the agreement in the instant case could satisfy [the Eighth Circuit's *Mackey*] test, we need not adopt this particular analysis. Rather, we rely on ... *Jewel Tea*.").

[79] *Id.* at 79-80 (emphasis added, citations omitted, alterations in original) (quoting *Connell Constr.*, 421 U.S. at 625, 95 S.Ct. 1830).

[80] *Id.* at 79. The NFL does not dispute that the nonstatutory exemption applies only to agreements regarding mandatory subjects of bargaining. *See* NFL Mem. at 13-14.

subjects of bargaining between employers and unions pertain to "wages, hours, and other terms and conditions of employment."[81] Only agreements on these subjects (and intimately related subjects) are exempt from the antitrust laws.[82] In *Jewel Tea*, the Court succinctly summarized the issue before it: "[W]hether the marketing hours restriction [during which butchers could sell fresh meat], like wages, and unlike prices is so intimately related to wages, hours and working conditions that ... [it] falls within the protection of the national labor policy and is therefore exempt from the Sherman Act."[83] By contrast, the Court noted that Jewel Tea, a chain of food-marketing stores, "need not have bargained about or agreed to a schedule of prices at which its meat would be sold."[84]

More recently, in *Brown v. Pro Football, Inc.*, the Court reiterated that the exemption is limited to mandatory subjects of collective bargaining and covers only conduct that arises from the collective bargaining process.[85] In *Brown*, the question

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[81] 29 U.S.C. § 158(d); *see also NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 78 S.Ct. 718, 2 L.Ed.2d 823 (1958).

[82] *See* Jewel Tea, 381 U.S. at 689, 85 S.Ct. 1596; *see generally* 1A Areeda & Hovenkamp, *Antitrust Law* ¶ 257c (noting that "there seems to be a single taproot [for application of the labor exemptions]: whether the challenged activities are seen as 'legitimate' labor activities directed at the wages, hours, and working conditions of the employees.").

[83] *Id.* at 689-90, 85 S.Ct. 1596; *see also* Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 *Yale L.J.* 1, 24 (1971) ("Important in Justice White's calculus was the fact that the marketing hours provision was a subject 'well within the realm of wages, hours and other terms and conditions of employment' about which employers and unions must bargain'") (quoting *Jewel Tea*, 381 U.S. at 691, 85 S.Ct. 1596).

[84] *Jewel Tea*, 381 U.S. at 689, 85 S.Ct. 1596 (emphasis added).

[85] 518 U.S. 231, 116 S.Ct. 2116, 135 L.Ed.2d 521.

was whether a unilateral decision by team owners to impose a salary cap on NFL practice squad players violated the antitrust laws when that cap was imposed by team owners after reaching a bargaining impasse with the NFLPA. In holding that the nonstatutory labor exemption applied to this wage limitation, the Court noted that "impasse and an accompanying implementation of proposals constitute an *integral part of the bargaining process*."[86] The Court repeatedly stated that the purpose behind the exemption is to support the collective bargaining process and ensure that it works in the manner intended by Congress.

Finally, the exemption can only cover actions that affect employees within the bargaining unit or those who seek to become employees and who will therefore be bound by those actions.[87] It is axiomatic that wages, hours, and other conditions of employment – such as employee benefits – can only apply to employees.

3. The Rule Is Not Covered by the Nonstatutory Labor Exemption

a. The Rule Does Not Address a Mandatory Subject of Collective Bargaining

The Rule provides that for college players seeking special eligibility, "at least three full college seasons [must] have elapsed since their high school graduation."[88] Nowhere is there a reference to wages, hours, or conditions of employment. Indeed, the Rule makes a class of potential players *unemployable*. Wages, hours, or working conditions affect only

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[86] *Id.* at 239, 116 S.Ct. 2116 (emphasis added).

[87] *See Mackey*, 543 F.2d at 614.

[88] *See supra* note 38.

those who are employed or eligible for employment.

The NFL argues that "[i]f the draft itself is protected by the non-statutory labor exemption, it follows *a fortiori* that rules governing eligibility for the draft ... are also protected by the exemption."[89] In support of this proposition, the NFL relies heavily on three recent Second Circuit cases all arising in the context of professional sports.[90] However, each of those cases involve practices that affect wages, hours or working conditions.

In *Wood v. National Basketball Association*, a college basketball player was a first-round draft choice in the 1984 college draft. Once drafted, Wood challenged three league provisions: (1) a team's exclusive right to bargain with its draft choice for a period of one year; (2) the salary cap that permitted the team to offer a first-year draftee only $75,000 if that team had reached its maximum allowable team salary; and (3) a limitation on player corporations utilized by players to create tax advantages.[91] The Second Circuit held that the nonstatutory labor exemption barred Wood's action. The court explained: "The gravamen of Wood's complaint, namely that the NBA-NBPA collective agreement is illegal because it prevents him from achieving his full free market value, is ... at odds with, and destructive of, federal labor policy."[92] The point is not hard to grasp. Wood was drafted and then challenged the agreement between the league and the players union that limited his right to negotiate about certain conditions of his employment –

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[89] NFL Mem. at 13-14.

[90] *See Caldwell v. American Basketball Ass'n*, 66 F.3d 523 (2d Cir.1995); *National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir.1995); *Wood v. National Basketball Ass'n*, 809 F.2d 954 (2d Cir.1987).

[91] *See Wood*, 809 F.2d at 957-58.

[92] *Id.* at 959.

namely which team he would play for, how much he would earn, and how he would receive his salary. Indisputably, these *all* involve wages and conditions of employment and are thus mandatory subjects of bargaining.[93]

National Basketball Association v. Williams also involved a dispute between the players and the league over the draft and the salary cap. A collective bargaining agreement, set to expire in 1994, governed the relationship between the players and the league.[94] During negotiations for a new CBA, the players sought elimination of three provisions of the expiring CBA: (1) the workings of the college draft whereby once drafted a player could only negotiate with the team that drafted him; (2) the right of first refusal permitting a team to match any offer made by another team to one of its current players; and (3) the revenue sharing/salary cap system establishing an overall wage framework.[95] The negotiations eventually reached an impasse, and the league brought an action seeking a declaration that the disputed provisions of the CBA did not violate the antitrust laws by virtue of the nonstatutory exemption.[96] The court agreed. Following *Wood*, the court held that each of the disputed terms governed players who are or would be employed by the league, and addressed the players' rights to negotiate over the team they will play for and the salary they will earn. These topics, by definition, concern the terms and conditions of employment that attach once a player is drafted.

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[93] The court held that the NBA's salary cap and college draft "are mandatory subjects of bargaining" because "[e]ach of them clearly is intimately related to wages, hours, and other terms and conditions of employment." *Id.* at 962 (quotation marks and citations omitted).

[94] *See Williams*, 45 F.3d at 686.

[95] *See id.* at 686.

[96] *Id.*

Finally, in *Caldwell v. American Basketball Association*, the plaintiff challenged his discharge. Caldwell claimed that he was wrongfully discharged because of his activities as the president of the players union, and that the league refused to employ him for those activities. The league asserted that Caldwell no longer had the physical capacity to play basketball. Caldwell sued the league alleging that his exclusion violated the antitrust laws. Holding that the nonstatutory labor exemption applied, the court stated that "Caldwell's right to challenge a discharge by the [league] had to be founded on labor rather than antitrust law."[97] In discussing both Caldwell's discharge and the league's refusal to employ him, the court stated that, "[t]his dispute is the familiar case of an employee asserting a discharge based on union activities."[98] While the court used broad language in holding that the league's policy regarding player suspension fell within the nonstatutory labor exemption because "a mandatory subject of bargaining pertinent in the instant matter is the circumstances under which an employer may discharge or refuse to hire an employee," the decision makes clear that the court treated the refusal to hire as synonymous with the dismissal.[99] The point is simple. *Caldwell* addresses a mandatory subject of bargaining – namely the conditions under which an employer may terminate an employee.

In sum, none of the cases cited by the NFL involve job *eligibility*. The league provisions addressed in *Wood*, *Williams*,

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[97] *Caldwell*, 66 F.3d at 530.

[98] *Id.*

[99] *Id.* at 528; *see also id.* at 529 ("Caldwell's claim regarding his discharge ....") (emphasis added). The court noted that Congress intended that this type of dispute should be heard by the National Labor Relations Board rather than the courts. If this were not the case, "every employee who is discharged could bring an antitrust action similar to Caldwell's." *Id.* (emphasis added).

and *Caldwell* govern the terms by which those who are drafted are employed. The Rule, on the other hand, precludes players from entering the labor market altogether, and thus affects wages only in the sense that a player subject to the Rule will earn none. But the Rule itself, for the reasons just discussed, does not concern wages, hours, or conditions of employment and is therefore not covered by the nonstatutory labor exemption.

b. The Nonstatutory Labor Exemption Cannot Apply to Those Who Are Excluded from the Bargaining Unit

The exemption is also inapplicable because the Rule *only* affects players, like Clarett, who are complete strangers to the bargaining relationship. The labor laws cannot be used to shield anticompetitive agreements between employers and unions that affect only those outside of the bargaining unit.[100] There is no dispute that collective bargaining agreements, and therefore the nonstatutory labor exemption, apply to both prospective and current employees.[101] Newcomers to an industry may not object to provisions of collective bargaining agreements that speak to wages, hours, or conditions of employment on the grounds that they were not present for the bargaining sessions. "[N]ewcomers in the industrial context routinely find themselves disadvantaged vís-a-vís those already hired .... that is [ ] a commonplace consequence of collective agreements."[102] Indeed, the *Wood* court held that a player,

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[100] *See Mackey*, 543 F.2d at 614 ("[T]he labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship.") (emphasis added).

[101] *See generally Wood*, 809 F.2d at 960.

[102] *Id.* at 960.

once drafted, could not object to the league's salary structure on the grounds that he never consented to the collective bargaining agreement.[103]

Clarett's situation is very different. He is not permitted to be drafted – allegedly because the NFL and the union agreed to exclude players in his class. But Clarett's eligibility was not the union's to trade away. Indeed, the Rule does not deal with the rights of *any* NFL players or draftees. That the nonstatutory exemption does not apply in such a case is simply the flip side of the rule that the exemption only applies to mandatory subjects of collective bargaining, those governing wages, hours, and working conditions. Employees who are hired after the collective bargaining agreement is negotiated are nonetheless bound by its terms because they step into the shoes of the players who did engage in collective bargaining. But those who are categorically denied eligibility for employment, even temporarily, cannot be bound by the terms of employment they cannot obtain. For this reason, too, the nonstatutory exemption does not apply.

c. The NFL Has Failed to Show that the Rule Arose from Arm's Length Negotiations

The nonstatutory exemption does not apply for a third reason: the NFL has failed to demonstrate that the Rule evolved from arm's-length negotiations between the NFLMC and the NFLPA. If there is any doubt on this issue, the NFL is not

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[103] The district court's holding was especially clear on this point: At the time an agreement is signed between the owners and the players' exclusive bargaining representative, all players within the bargaining unit and those who enter the bargaining unit during the life of the agreement are bound by its terms. *Wood v. National Basketball Ass'n*, 602 F.Supp. 525, 529 (S.D.N.Y.1984), *aff'd*, 809 F.2d 954.

entitled to summary judgment on this defense.

The record is peculiarly sparse in establishing the evolution of the Rule. Indeed, what the record omits speaks louder than what it contains. As noted above, the Rule was first adopted shortly after the 1925 draft.[104] The NFLPA was not formed until 1956, did not become the players' exclusive bargaining agent until 1968,[105] and the first collective bargaining agreement was not adopted until 1968.[106] From these meager facts, it seems quite clear that the first version of the Rule could not have arisen from the collective bargaining process. The NFL offers no evidence that the Rule was addressed during collective bargaining negotiations prior to 1993.

The only evidence that it was addressed in 1993 is the following conclusory statement from the Declaration of Peter Ruocco: "During the course of collective bargaining that led to the 1993 CBA, the eligibility rule itself was the subject of collective bargaining."[107] But the CBA never mentions the Rule. Rather, the CBA states that the NFLPA "*waive[s]* ... its rights to bargain over any provision of the Constitution and Bylaws ... to sue the NFL over any provision of the Constitution and Bylaws ... [and] to resolve any dispute ... involving the interpretation or application of the Constitution and Bylaws in accordance with the dispute resolution procedures of the CBA."[108] While these references to the 1993 Bylaws, which in fact contained the then-existing version of the Rule, demonstrate that the union agreed not to *bargain over* or

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[104] *See supra* note 25.

[105] *See Smith*, 420 F.Supp. at 741.

[106] *See id.*

[107] Ruocco Decl. ¶ 8.

[108] *Id.* (referencing Articles III, IV, and IX of the 1993 CBA) (emphasis added).

challenge the Rule, they in no way demonstrate that the Rule itself arose from, or was agreed to during, the process of collective bargaining. Quite the contrary. As noted, the CBA states that the "NFLPA *waived* ... its rights *to bargain* over any provision of the Constitution and Bylaws."[109] Thus the only proof submitted by the NFL strongly suggests that the Rule was never the subject of collective bargaining between the League and the union, and did not arise from the collective bargaining process.[110]

While Clarett offers no *evidence* on the issue of arm's-length bargaining, he certainly highlights the NFL's absence of proof. Because the NFL has not demonstrated that the Rule evolved from this process, the NFL is not entitled to summary judgment based on the nonstatutory labor exemption.

B. Antitrust Standing

Having rejected the application of the nonstatutory labor exemption, I turn next to the merits of Clarett's antitrust claim. In order to assert that claim, Clarett must demonstrate that he

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[109] Ex. D to Ruocco Decl. (emphasis added).

[110] The NFL makes much of a side letter dated May 6, 1993. This letter adds nothing to the record. The letter is from the general counsel of the NFLPA to the attorney for the NFLMC. The full text of the letter follows: "This letter confirms that the attached documents are the presently existing provisions of the Constitution and Bylaws of the NFL referenced in Article IV, Section 2, of the Collective Bargaining Agreement." Ex. G to Ruocco Decl. Indeed, the 2003 version of the Rule is now omitted from the Bylaws. Instead, the Bylaws now refer to a memorandum from the Commissioner issued pursuant to his power to establish policy and procedure with respect to the Constitution and Bylaws. The Commissioner has issued a release that describes the eligibility for the 2004 draft. That release maintains the Rule excluding players less than three years removed from high school graduation.

has suffered an antitrust injury.[111]

1. The Antitrust Injury Requirement

Antitrust injury – an element of antitrust standing[112] – is (1) "injury of the type the antitrust laws were intended to prevent" and (2) injury "that flows from that which makes defendants' acts unlawful."[113] As explained by the Supreme Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, the antitrust injury doctrine is designed to ensure that "the injury ... reflect[s] the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."[114] The Supreme Court has further explained the requirement as "ensuring that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the

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[111] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977); *see also Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341-42, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990).

[112] In *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537-45, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), the Supreme Court identified additional factors for lower courts to consider in determining whether a particular plaintiff has standing to bring suit under the antitrust laws. Those factors include: (1) the causal connection between an antitrust violation and the alleged harm suffered by the plaintiff; (2) the nature of the plaintiff's antitrust injury; (3) the directness or remoteness of the asserted injury; (4) the existence of more direct and identifiable victims of the antitrust violation; and (5) the potential for duplicative recovery or complex apportionment of damages. *See also Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*, 540 U.S. 398, 124 S.Ct. 872, 884, 157 L.Ed.2d 823 (2004) (Stevens, J., concurring). The NFL does not object to Clarett's antitrust standing, apart from its challenge to his asserted antitrust injury.

[113] *Brunswick Corp.*, 429 U.S. at 489, 97 S.Ct. 690.

[114] *Id.*

first place," and more specifically, it "ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior."[115] Thus, the antitrust injury requirement codifies the well-known motto of the Sherman Act, "The antitrust laws ... were enacted for 'the protection of *competition* not *competitors*.'"[116]

2. Clarett Has Antitrust Standing

Clarett alleges that the NFL's Rule constitutes a "group boycott" that restrains trade in the NFL labor market by erecting a barrier to market entry.[117] For reasons discussed in greater detail below, the Rule is a naked restraint on competition for player services because it excludes a class of players from entering the market. It harms competition because some players are simply not permitted to compete.[118] Clarett's injury – his exclusion from the NFL – flows directly from the anticompetitive effects of the Rule, and thus constitutes antitrust injury. Accordingly, Clarett has antitrust standing. Indeed, three courts have reached the merits of almost identical claims that challenged, on antitrust grounds, the validity of restrictions barring younger players from competing for positions in various sports leagues.[119]

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[115] *Atlantic Richfield*, 495 U.S. at 342-44, 110 S.Ct. 1884 (emphasis in original).

[116] *Brunswick Corp.*, 429 U.S. at 488, 97 S.Ct. 690 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962)) (emphasis in original).

[117] *See Compl.* ¶¶ 34-35 ("The Rule is a per se violation of the Sherman Act.... The Rule is a group boycott and a concerted refusal to deal with individuals such as Clarett.").

[118] *See infra* Part IV.C.3.a.

[119] *See Boris v. United States Football League*, No. 83 Civ. 4980, 1984 WL 894 (C.D.Cal. Feb. 28, 1984); *Linseman v. World Hockey Ass'n*, 439 F.Supp. 1315 (D.Conn. 1977); *Denver Rockets*

a. The Rule Need Not Affect Price or Output for Clarett to Have an Antitrust Injury

Nonetheless, the NFL argues that Clarett has no antitrust injury, and therefore no standing, because the Rule has no effect on either price (defined as player salary) or output (defined as the number of jobs) in the relevant market. The NFL relies on the Seventh Circuit's decision in *Chicago Professional Sports Ltd. Partnership v. National Basketball Association*, where Judge Easterbrook suggested that "[t]he antitrust injury doctrine ... requires every plaintiff to show that its loss comes from acts that reduce output or raise prices to consumers."[120] The NFL reasons that the Rule has no effect on price because player salaries are prescribed by the League's salary cap, which teams consistently meet, and does not affect output, because League rules limit the number of roster spots available to each team, which each team consistently fills. Because price and output are therefore relatively static, the NFL concludes that Clarett has no antitrust injury.

Such a rigid "price or output" rule finds little support in the case law. Even within the Seventh Circuit, the validity of the *Chicago Professional Sports* rule is debatable. *First*, the rule itself is plain dicta. As the court conceded at the outset, "[a]ntitrust injury is one subject in particular that has not been

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v. All-Pro Management, Inc., 325 F.Supp. 1049 (C.D.Cal.1971). Although none of these cases address antitrust injury directly, Boris and Linseman were decided after Brunswick, so both courts presumably satisfied themselves that such an injury existed. Otherwise, the plaintiffs would have lacked standing to bring their antitrust claims.

[120] *See Compl.* ¶¶ 34-35 ("The Rule is a per se violation of the Sherman Act.... The Rule is a group boycott and a concerted refusal to deal with individuals such as Clarett.").

presented for decision here."[121] *Second*, the Seventh Circuit itself has been inconsistent in addressing the question of whether an impact on consumers (in this case, the NFL teams) via price or output is required to show antitrust injury.

> Whether harm to consumers is the *sine qua non* of antitrust injury is an issue over which there is currently a split in this circuit. Some of our cases hold that a plaintiff, to satisfy the antitrust injury requirement, must demonstrate that the challenged practice causing him harm also harms consumers by reducing output or raising prices. Others hold that application of the antitrust laws does not depend in each particular case upon the ultimate demonstrable consumer effect.[122]

Third, application of the "price or output" rule is particularly questionable in the context of labor (as opposed to product) markets. As the just-quoted passage reveals, changes in price or output are measures of the effect on *consumers* of a questioned practice. But in a labor market – where the consumers of labor are also usually the antitrust defendants – it makes little sense to require harm to consumers as a prerequisite for antitrust standing.[123]

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[121] *Id.* at 669 (emphasis added).

[122] *Banks v. National Collegiate Athletic Ass'n*, 977 F.2d 1081, 1097 (7th Cir.1992) (Flaum, J., concurring in part and dissenting in part) (citations and quotation marks omitted) (*comparing Chicago Prof'l Sports*, 961 F.2d at 670 *with Fishman v. Estate of Wirtz*, 807 F.2d 520, 536 (7th Cir.1986)).

[123] *See id.* at 1098 ("[T]he market at issue here is the college football labor market, and the NCAA member colleges are consumers in that market. It would be counterintuitive to require Banks to demonstrate that the no-draft and no-agent rules harm the

There is even less support for a strict "price or output" rule outside of the Seventh Circuit. Indeed, none of the other Courts of Appeals has ever endorsed such a test. Rather, the Supreme Court as well as the lower courts have recognized that while allegations of inflated prices or reduced services as a result of a defendant's anticompetitive conduct are among the classic examples of antitrust injury,[124] they are but two of the many ways in which a defendant's anticompetitive conduct can adversely affect the market. As the Ninth Circuit held in *Les Shockley Racing, Inc. v. National Hot Rod Association*, a violation of the Sherman Act is threatened "when the restraining force of an agreement or other arrangement affecting trade becomes unreasonably disruptive of market functions *such as* price setting, resource allocation, market entry, or output designation."[125]

In other words, an effect on price or output is a sufficient but not a necessary element of antitrust injury. Antitrust injury may arise from other anticompetitive effects, including barriers to market entry. The Supreme Court has long held that group boycotts are injurious to competition – and thus may give rise to a plaintiff's antitrust injury – when those barriers do *not* affect price or output, or even when they affect price or output in a way that is beneficial to competition:

> Group boycotts ... have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to

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colleges, the very entities that established those rules. I doubt very strongly that the rule laid out in Chicago Professional Sports, to the extent it is valid elsewhere, was intended to apply in this context.") (emphasis in original).

[124] *See Associated Gen. Contractors*, 459 U.S. at 538, 103 S.Ct. 897.

[125] 884 F.2d 504, 508 (9th Cir.1989) (emphasis added).

> show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." Even when they operated to lower prices or temporarily to stimulate competition they were banned.[126]

Clarett alleges a group boycott excluding him, and all others like him, from the market. His exclusion is an injury flowing directly from the anticompetitive effect of the Rule.

b. Clarett Alleges a Group Boycott, Not Merely That Another Player Has Taken His Place

The NFL conveniently mischaracterizes Clarett's claim as "an allegation that the eligibility rule will enable another player to secure a roster position and compensation that, in plaintiff's view, should be his own."[127] Clarett readily admits that this would not be an antitrust injury.[128] In fact, Clarett is not complaining that he was replaced by other players as a result of competition in a fair and open market. Rather, Clarett

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[126] *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959) (quoting *Fashion Originators' Guild of Am. v. Federal Trade Comm'n*, 312 U.S. 457, 466, 61 S.Ct. 703, 85 L.Ed. 949 (1941)).

[127] Memorandum in Support of the National Football League's Motion for Summary Judgment (Antitrust Injury) ("NFL AI Mem.") at 12.

[128] *See* Plaintiff's Memorandum in Opposition to Defendant National Football League's Motion for Summary Judgment (Antitrust Injury) ("Clarett AI Mem.") at 10 ("Defendant asserts that the substitution of one supplier of services for another does not constitute antitrust injury. We agree."); *see also* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 137, 119 S.Ct. 493, 142 L.Ed.2d 510 (1998) ("The freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage.").

alleges that he and other players made ineligible under the Rule have been *foreclosed* from entering the market altogether. "They are not losers in a competitive marketplace; they are not even allowed in the game."[129]

In support of its argument, the NFL relies on cases involving "supplier substitution" rather than exclusion from the relevant market. As such, these cases are inapposite. The only case among those cited by the NFL that binds this Court – the Second Circuit's decision in *Balaklaw v. Lovell*[130] – provides the perfect example. In *Balaklaw*, plaintiff enjoyed a *de facto* exclusive contract to provide anesthesiology services at Cortland Memorial Hospital. That relationship ended when the Hospital decided to solicit proposals for a written exclusive contract. The Hospital reviewed nine proposals including one from Dr. Balaklaw's group and interviewed four of the applicant groups, again including Dr. Balaklaw's, before ultimately awarding the exclusive contract to a group headed by Dr. Delf King. Dr. Balaklaw sued the Hospital, alleging "that the Hospital's and Dr. King's actions in entering into the exclusive anesthesiology contract constituted a conspiracy to engage in an illegal group boycott of, and a concerted refusal to deal with, Dr. Balaklaw."[131] The Second Circuit rejected this claim, holding that "injuries resulting from competition alone are not sufficient to constitute antitrust injuries."[132] Dr. Balaklaw's injury, the court explained, stemmed not from a group boycott, but from competition: "Dr. Balaklaw, like seven of the other eight anesthesiology groups that submitted proposals, simply failed to win the exclusive contract to practice anesthesiology at CMH.... By closing its doors to Dr. Balaklaw *in favor of one of his competitors*, CMH did nothing

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[129] Clarett Al Mem. at 10.

[130] 14 F.3d 793.

[131] *Id.* at 796.

[132] *Id.* at 797.

to inflict an injury of the type the antitrust laws were intended to prevent."[133]

In contrast to *Balaklaw*, the Rule precludes Clarett from entering into "fair and vigorous competition." Clarett does not merely allege, as plaintiffs in *Balaklaw* did, that he was harmed *by* competition. Rather, the harm to Clarett – his exclusion from the League – flows from a harm *to* competition.

The NFL's reliance on two other cases – the Ninth Circuit's decision in *Les Shockley Racing*[134] and the Sixth Circuit's decision in *National Hockey League Players'*

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[133] *Id.* at 801-02 (emphasis added) (footnote omitted). The NFL's reliance on *Mathias v. Daily News, L.P.*, 152 F. Supp. 2d 465 (S.D.N.Y.2001), is also misplaced. That case involved a suit by newspaper delivery firms against the Daily News, alleging that when the newspaper started delivering its own papers it "attempted to eliminate competition between itself and the Carriers." *Id.* at 479. As in *Balaklaw*, the court held that defendant's conduct was merely ordinary competition:

> [F]air and vigorous competition necessarily entails success for some and loss or only marginal profit for others – a natural result which never sits well with all of the parties who sacrifice and risk equally to compete in the marketplace. But the antitrust laws require competitors to show more than individual loss or exclusion resulting from fair and vigorous competition. Here, the Carriers fail to allege any facts that point to a demonstrable impact on the market. Therefore, because of their failure to plead antitrust injury, the Carriers' [antitrust] causes of action are dismissed.

Id. at 480 (emphasis added).

[134] 884 F.2d 504.

Association ("NHLPA") v. Plymouth Whalers Hockey Club[135] – is equally unavailing. Those cases deal with the merits of the plaintiffs' respective antitrust claims, not antitrust standing. Indeed, the *Les Shockley* court even went out of its way to explain that it was *not* addressing antitrust injury: "[W]hether plaintiffs would meet the five-factor standing test of *Associated Gen. Contractors* is irrelevant to this appeal."[136]

To the extent that those two cases have *any* bearing on Clarett's case – because they concern the exclusion of potential competitors in the sports context – they are easily distinguished. The plaintiffs in *Les Shockley Racing* were owners and operators of jet-powered trucks and motorcycles who staged exhibition drag races. The National Hot Rod Association ("NHRA") banned exhibition drag racing of jet-powered motorcycles and trucks on tracks under their sponsorship or control. Plaintiffs claimed that this ban violated section 1 of the Sherman Act by restraining trade in the market for "exhibition drag racing services."[137] Plaintiffs further alleged that because the NHRA controlled the majority of drag racing tracks, plaintiffs were effectively blocked from the relevant market. In affirming dismissal of the complaint, the court held that plaintiffs had failed to allege that their exclusion resulted in a "reduction of competition in the market in general" as opposed to "injury to their own position as competitors in the market."[138] The court went on to provide examples of what was

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[135] 325 F.3d 712 (6th Cir.2003).

[136] 884 F.2d at 509 n. 1 (noting that the court was specifically declining to address antitrust standing because "[b]y holding that injury to competition was inadequately pleaded, the district court determined that no violation of the antitrust law was stated. Thus, no party could sue on the basis of the allegations in the amended complaint.") (emphasis added).

[137] 884 F.2d at 508.

[138] *Id.*

lacking:

> Absent are factual allegations outlining the effect of the NHRA's ban on the price or availability of exhibition drag racing services in the United States; the allocation of work hours, vehicle parts, and other resources crucial to the provision of those services; the availability of opportunity for entry into the market through the use of jet-powered vehicles other than trucks or motorcycles; or any other characteristic or function of a competitive market.[139]

Clarett's case is starkly different. Clarett defines the relevant market as the NFL labor market for player services. He specifically pleads a complete barrier to market entry. "The Rule is harmful to competition as it provides for total exclusion of players who have not completed three college seasons or are not three years removed from high school graduation, *notwithstanding their ability to perform in the market and compete for available positions in the league*."[140] Clarett also specifically alleges that "[t]here is no other league of professional football that is comparable to the NFL."[141]

The market defined by Clarett is narrow – it is the market for NFL player services. That is the only commodity that Clarett has to sell and the only commodity the NFL seeks to buy. Accordingly, the Rule harms both Clarett and competition in the market for player services. A purchaser's bar on an entire class of sellers harms competition in the absence of an alternative comparable buyer.[142] By contrast, the

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[139] *Id.* at 509.

[140] Compl. ¶ 38.

[141] *Id.* ¶ 30.

[142] *See infra* Part IV.C.3.a.

market in *Les Shockley* was the market for all exhibition drag racing. While jet-powered trucks and motorcycles were excluded from that market, plaintiffs were not. They could have competed by offering to exhibit other jet-powered vehicles or non jet-powered trucks and motorcycles. Indeed, this point was explicitly acknowledged by the *Les Shockley* court. "[W]hen the restraining force of the agreement or other arrangement affecting trade becomes *unreasonably* disruptive of market functions such as ... market entry ... a violation of the Sherman Act [is] threatened."[143] [FN143]

Similarly, plaintiffs' claims in *NHLPA* were dismissed because the plaintiffs did not identify a market in which competition was impaired: "Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim. Appellees do not define a relevant market in their complaint...."[144] Thus, the court ruled that plaintiffs had failed to demonstrate a required *element* of a section 1 claim: injury to competition within a definable market. This failure was critical because the ill-defined market made it impossible to gauge whether other comparable leagues were unavailable to the plaintiffs such that competition was harmed.

While at first glance the age-based ban on athletes at issue in *NHLPA* may appear similar to the Rule, that facial similarity is misleading. Because the NFL is not comparable to other professional football leagues, the contours of the market identified by Clarett are clear. In *NHLPA*, plaintiffs identified a product market for amateur hockey, *i.e.*, a market where the Ontario Hockey League was the seller of amateur hockey to its fans. Thus, the *NHLPA* plaintiffs alleged harm to the spectators who were deprived of the opportunity to see the best players. It

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[143] 884 F.2d at 508.

[144] 325 F.3d at 719-20 (quotation marks and citations omitted) (emphasis added).

is not surprising that the court found no anticompetitive effects in that market from the alleged age-based eligibility restriction. Such a rule could have affected the product of amateur hockey only by diminishing the quality of play – a concern of no relevance under the antitrust laws.[145] Clarett, by contrast, seeks to sell his services in a *labor* market. Thus, the harm he alleges is to the market of players selling their services, not to the market of consumers viewing the players.[146]

Intellective, Inc. v. Massachusetts Mutual Life Insurance Co.[147] demonstrates that unreasonable barriers to market entry – *i.e.*, group boycotts – are sufficient to establish antitrust injury. In *Intellective*, a consortium of life insurers known as the "Working Group" entered into an agreement to withhold historical data (such as might be used in preparing a comparative analysis of the insurers' investment management practices or asset allocation strategies) from third parties that might wish to prepare such studies.[148] Intellective, a consulting firm that was not affiliated with the Working Group, alleged that this arrangement violated section 1 by erecting "'tremendous barriers of entry for anyone who wishes to compete' because '[a]ny investment performance survey which does not include data from the Working Group companies will be much less valuable than one that does.'"[149]

Defendants argued that Intellective had not sustained an

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[145] *See id.* at 720.

[146] *See infra* Part IV.C.3.a.

[147] 190 F. Supp. 2d 600 (S.D.N.Y. 2002).

[148] *See id.* at 605 ("Once a company signs on to participate ... that company can never give the same historical investment performance data to any other consultant. In other words ... the Working Group has locked up the information necessary to perform competing studies.").

[149] *Id.* at 606 (quoting the complaint; alteration in original).

antitrust injury because it was merely complaining that it had lost its job preparing comparative studies to the Working Groups' preferred consultants.[150] The court concluded that, "[t]o the extent Intellective claims injury relating to its loss of the [ ] contract, defendants are correct that Intellective has not pleaded an adequate antitrust injury. Intellective lost the [ ] contract to Sagamore [a competing firm] through competition between the two."[151] But the court also found that the Working Groups' systematic exclusion of other firms – Intellective or anyone else – from entering the market for producing comparative life insurance investment reports constituted a legitimate antitrust injury:

> Defendants mistake Intellective's primary complaint. Although Intellective does complain of the Insurance Company Defendants' decision not to award the contract to Intellective, Intellective's principal claim stems from the Working Group's attempt to monopolize the information necessary to compete in the relevant market. *Intellective adequately states an antitrust injury in this regard.* Intellective alleges that it, and all others, are prevented from competing in the relevant market by the Working Group's control of the data necessary to perform a competing study. *The prevention of this type of marketwide competition is an "injury of the type the antitrust laws were designed to prevent."* Further, Intellective's own injury–its inability to compete in this market–stems from defendants' activities, as required under *Atlantic Richfield*.[152]

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[150] *See id.* at 613.

[151] *Id.*

[152] *Id.* (emphases added) (footnote omitted) (quoting *Brunswick*,

Clarett has a demonstrable antitrust injury for precisely the same reason: he alleges that the Rule prevents him, and all others similarly situated, from competing in the relevant market. And Clarett's own injury – his inability to compete in the market – stems from defendant's activities.[153] Thus, he has demonstrated antitrust injury.

C. The Rule Is an Unreasonable Restraint of Trade

1. The Sherman Act Forbids Unreasonable Restraints of Trade

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429 U.S. at 489, 97 S.Ct. 690).

[153] The NFL attempts to distinguish Intellective on two grounds, neither of which is persuasive. First, it argues that Intellective arose in the context of a motion to dismiss. While that is true, it in no way affects the court's analysis. In *Intellective*, the complaint alleged that the Working Group withheld the relevant data from all competitors, shutting them out of the market. In this case, it is undisputed that the Rule prohibits underclassmen from entering the market. The fact that the court in Intellective was required to accept the complaint's allegations is a distinction without a difference. The court was not required, as the NFL suggests, to accept as true plaintiff's legal conclusion that it had an antitrust injury.

The NFL also perseverates over the fact that the exclusion in *Intellective* was "permanent," 190 F. Supp. 2d at 616, whereas the Rule only forbids players from entering the NFL temporarily, deferring their entry for a number of years. While this is true, that fact played no role whatsoever in the court's decision. In any case, whether Clarett's exclusion is temporary or permanent goes to the extent of his antitrust injury, not the existence of that injury.

Section 1 of the Sherman Act prohibits "[e]very contract, combination ... or conspiracy, in restraint of trade."[154] Although the plain language of the Sherman Act would suggest that every contract in restraint of trade violates the antitrust laws, the Supreme Court has long held that the Sherman Act prohibits only "unreasonable" restraints of trade.[155] Thus, in order to prevail, "a plaintiff claiming a § 1 violation must first establish a combination or some form of concerted action between at least two legally distinct economic entities .... [I]t must then proceed to demonstrate that the agreement constituted an unreasonable restraint of trade ... ."[156] It is undisputed that the Rule is the product of concerted action amongst the NFL teams. The only issue that remains is whether the Rule is an unreasonable restraint of trade.

To determine whether a restraint of trade is unreasonable, most antitrust claims are analyzed according to the "rule of reason." This rule requires analysis of various factors including information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.[157] Some types of restraints, however, have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se* and no further inquiry is required.[158] *Per se* treatment is

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[154] 15 U.S.C. § 1.

[155] *See United States v. Joint-Traffic Ass'n*, 171 U.S. 505, 19 S.Ct. 25, 43 L.Ed. 259 (1898); *see also State Oil Co. v. Khan*, 522 U.S. 3, 10, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 342-43, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982).

[156] *Capital Imaging*, 996 F.2d at 542.

[157] *See Maricopa County*, 457 U.S. at 343 and n. 13, 102 S.Ct. 2466.

[158] *See Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958).

appropriate "[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it."[159] The *per se* rule is used when courts are confronted with conduct that experience teaches is overwhelmingly likely to be anticompetitive; in such cases there is no need for a detailed market analysis.[160] "Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are [horizontal] price fixing, division of markets, group boycotts, and tying arrangements."[161]

2. The Validity of the Rule Must Be Analyzed Under the Rule of Reason

In *NCAA v. Board of Regents*, the Supreme Court modified the per se approach for industries in which some horizontal restraints are necessary. In such industries, even conduct that is normally condemned as per se unreasonable must be evaluated under the rule of reason in order to take into account the realities of the industry's regulatory landscape. As one scholar explained,

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[159] *Maricopa County*, 457 U.S. at 344, 102 S.Ct. 2466; *see also Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979) (a per se rule is applied when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output").

[160] *See National Collegiate Athletic Ass'n ("NCAA") v. Bd. of Regents of University of Oklahoma*, 468 U.S. 85, 104, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984) ("[w]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same–whether or not the challenged restraint enhances competition. Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition.").

[161] *Northern Pacific*, 356 U.S. at 5, 78 S.Ct. 514 (citing cases).

> [S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams.[162]

Thus, in *NCAA*, the Court held that while

> [h]orizontal price fixing and output limitation are ordinarily condemned as a matter of law under an "illegal *per se*" approach because the probability that these practices are anticompetitive is so high ... we have decided that it would be inappropriate to apply a *per se* rule to this case ... [because] this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.[163]

Here, notwithstanding the fact that Clarett alleges that the Rule constitutes a group boycott – conduct that historically falls into the *per se* category[164] – the parties agree that the rule

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[162] Robert H. Bork, *The Antitrust Paradox* 278 (1978) (quoted in NCAA, 468 U.S. at 101, 104 S.Ct. 2948).

[163] *NCAA*, 468 U.S. at 100-01, 104 S.Ct. 2948; *see also VKK Corp. v. National Football League*, 244 F.3d 114, 131 (2d Cir.2001) ("While some restraints of trade are illegal per se, others, such as trade restrictions by sports leagues, are analyzed to determine whether the restriction's 'harm to competition outweighs any procompetitive effects.'") (quoting *St. Louis Convention & Visitors Comm'n v. National Football League*, 154 F.3d 851, 861 (8th Cir.1998)).

[164] Even if this case did not arise in the sports context, the rule of reason might have applied. The Supreme Court has signaled its intent to move group boycotts off the short list of per se

of reason applies because the challenged restraint arises in the context of a sports league.

3. Application of the Rule of Reason

In evaluating a rule of reason case on summary judgment, courts employ a three step burden-shifting test.

> Under this test plaintiff bears the initial burden of showing that the challenged action has had an actual adverse effect on competition as a whole in the relevant market.... After the plaintiff satisfies its threshold burden of proof under the rule of reason, the burden shifts to the defendant to offer evidence of the pro-competitive "redeeming virtues" of their combination. Assuming defendant comes forward with such proof, the burden shifts back to plaintiff for it to demonstrate that any legitimate collaborative objectives proffered by defendant could have been achieved by less restrictive alternatives, that is, those that would be less prejudicial to competition as a whole.[165]

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unreasonable conduct. *Compare Klor's*, 359 U.S. at 212, 79 S.Ct. 705, *with Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458-59, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986), and *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985). *See generally Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d Cir. 1999) ("Generally, group boycotts are illegal per se. Not all such boycotts, however, are per se violations. The scope of the per se rule against group boycotts is a recognized source of confusion in antitrust law.") (citations omitted).

[165] *Capital Imaging*, 996 F.2d at 543 (citations omitted) (quoting 7 Areeda & Hovenkamp, *Antitrust Law* ¶ 1502).

a. The Rule Is a Naked Restraint of Trade

Clarett alleges that the Rule constitutes a "group boycott" that restrains trade in the relevant market (the NFL player market) by denying market entry to certain sellers (players less than three years removed from high school graduation). This is precisely the sort of conduct that the antitrust laws were designed to prevent: "whatever other conduct the Acts may forbid, they certainly forbid all restraints of trade which were unlawful at common-law, and one of the oldest and best established of these is a contract which unreasonably forbids any one to practice his calling."[166]

Courts have found that similar entry barriers violate the antitrust laws. In *Denver Rockets v. All-Pro Management, Inc.*[167] – the so-called "Spencer Haywood" case – the court considered an NBA bylaw that restricted eligibility to players who were at least four years removed from the date of their high school graduation (or, in the case of players who did not graduate high school, from the date of the remainder of their class's high school graduation). Holding that the four-year rule constituted an unreasonable restraint of trade, the court explained:

> Application of the four-year college rule constitutes a "primary" concerted refusal to deal wherein the actors at one level of a trade pattern (NBA team members) refuse to deal with an actor at another level (those ineligible under the NBA's four-year college rule).
>
> The harm resulting from a "primary" boycott

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[166] *Gardella*, 172 F.2d at 408.

[167] 325 F. Supp. 1049.

> such as this is threefold. First, the victim of the boycott is injured by being excluded from the market he seeks to enter. Second, competition in the market in which the victim attempts to sell his services is injured. Third, by pooling their economic power, the individual members of the NBA have, in effect, established their own private government. Of course, this is true only where the members of the combination possess market power in a degree approaching a shared monopoly. This is uncontested in the present case.[168]

Similar age-based restrictions have been struck down in the context of professional hockey[169] and professional football.[170] Although all of these cases were decided prior to *NCAA* – and thus employed a *per se* analysis – their economic analysis remains sound. Age-based eligibility restrictions in professional sports are anticompetitive because they limit competition in the player personnel market by excluding sellers.

Nonetheless, the NFL argues that Clarett has failed to

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[168] *Id.* at 1061.

[169] *See Linseman*, 439 F.Supp. at 1320 (preliminarily enjoining a rule declaring players younger than twenty ineligible for hockey league draft because it was an illegal "group boycott, or a concerted refusal to deal, [that] has been long and consistently classified as a per se violation of the Sherman Act.").

[170] *See Boris*, 1984 WL 894, at *1 (preliminarily enjoining, as an illegal group boycott, a rule providing that "[n]o person shall be eligible to play ... unless (1) all college football eligibility of such player has expired, or (2) at least five (5) years shall have elapsed since the player first entered or attended a recognized junior college, college or university or (3) such player received a diploma from a recognized college or university").

establish a prima facie claim under section 1 because he has not "establish[ed] the contours of the relevant market."[171] This argument fails for two reasons, one factual and one legal. *First*, Clarett has sufficiently defined the relevant market. In his complaint, Clarett alleges that "[t]he NFL is a distinct market for professional football for which there are no reasonable substitutes in the United States."[172] The relevant market is therefore the market for NFL players.[173] That the League has exclusive market power in this arena is obvious; the very fact that it can establish a Rule that excludes players from the market altogether demonstrates its market domination.

Second, as a legal matter, the NFL's argument that Clarett has failed to define the relevant market "misapprehends the purpose in antitrust law of market definition, which is not an end unto itself but rather exists to illuminate a practice's effect on competition."[174] As the Tenth Circuit has explained,

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[171] *See* NFL Mem. at 20 (quoting *Union Carbide Corp. v. Montell N.V.*, 28 F. Supp. 2d 833, 840 (S.D.N.Y.1998)).

[172] Compl. ¶ 8.

[173] The League's suggestion that one of the other professional football leagues in North America is a fair substitute for the NFL cannot be taken seriously. "[M]arket definition is guided by an analysis of the interchangeability of use or the cross-elasticity of demand for potential substitute products." *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir.2001) (quotation marks and citations omitted). In the case of a labor market or buyer-side conspiracy, these factors are reversed. "In such a case, the market is not the market of competing sellers but of competing buyers. This market is comprised of buyers who are seen by sellers as being reasonably good substitutes." *Id.* at 202 (quotation marks and citations omitted). No elaborate factual record need be developed to recognize that no football player would see the Arena League or the Canadian League as a reasonably good substitute for the NFL.

[174] *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1020 (10th Cir.1998).

"A plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects ... ."[175]

"To avoid examining the relevant market, market power, and anticompetitive effect in all cases in which conduct does not clearly fit within a *per se* category, the Supreme Court has sanctioned an intermediate inquiry, known as 'quick look,' if the conduct at issue is a 'naked restriction.'"[176] Such a "quick look" analysis, as the Supreme Court has recently explained, is appropriate where "the great likelihood of anticompetitive effects can easily be ascertained," and "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have

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[175] *Id.* at 1019.

[176] *Bogan*, 166 F.3d at 514 n. 6.; *see also Capital Imaging*, 996 F.2d at 546 (holding that "the plaintiff may satisfy [its] burden without detailed market analysis by offering proof of actual detrimental effects" to demonstrate "that the defendants' conduct or policy has had a substantially harmful effect on competition"); Law, 134 F.3d at 1020 ("[W]here a practice has obvious anticompetitive effects ... there is no need to prove that the defendant possesses market power. Rather, the court is justified in proceeding directly to the question of whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects under a 'quick look' rule of reason."); *see generally California Dental Ass'n v. Federal Trade Comm'n*, 526 U.S. 756, 779, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999) ("The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear. We have recognized, for example, that there is often no bright line separating per se from Rule of Reason analysis, since considerable inquiry into market conditions may be required before the application of any so-called per se condemnation is justified.") (quotation marks omitted).

an anticompetitive effect."[177]

The Rule is the perfect example of a policy that is appropriately analyzed under the "quick look" standard because its anticompetitive effects are so obvious. Indeed, one can scarcely think of a more blatantly anticompetitive policy than one that excludes certain competitors from the market altogether. Because the Rule has the actual anticompetitive effect of excluding players – including Clarett – from the NFL, it is a naked restriction.[178] Clarett has therefore established a prima facie violation of section 1 of the Sherman Act.

b. The Rule Has No Legitimate Procompetitive Justification

Because Clarett has established the anticompetitive effect of the Rule, the burden shifts to the NFL to offer a procompetitive justification.[179] The NFL offers four justifications:

> The purposes of the eligibility rule include [1] protecting younger and/or less experienced players – that is, players who are less mature physically and psychologically – from heightened risks of injury in NFL games; [2] protecting the NFL's entertainment product from the adverse consequences associated with such injuries; [3] protecting the NFL clubs from

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[177] *California Dental*, 526 U.S. at 770, 119 S.Ct. 1604.

[178] *See* 13 Areeda & Hovenkamp, *Antitrust Law* ¶ 2201a ("A concerted refusal to deal is 'naked' if its objectively intended purpose is to keep the target's output off the market....").

[179] *See id.* at 788, 119 S.Ct. 1604 (Breyer, J., concurring in part and dissenting in part) ("In the usual Sherman Act § 1 case, the defendant bears the burden of establishing a procompetitive justification.").

> the costs and potential liability entailed by such injuries; and [4] protecting from injury and self-abuse other adolescents who would over-train – and use steroids – in the misguided hope of developing prematurely the strength and speed required to play in the NFL.[180]

While these may be reasonable *concerns*, none are reasonable *justifications* under the antitrust laws.[181]

The NFL's first and fourth justifications – the desire to protect younger athletes from injury or over-training – can be dismissed out of hand. The antitrust laws require a *procompetitive* justification in the face of a demonstrably anticompetitive rule.[182] The NFL's concern for the health of younger players is laudable, but it has nothing to do with promoting competition.

The NFL's second and third justifications – the desire to protect the League and its teams from the costs associated with

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[180] NFL Mem. at 4.

[181] Clarett argues that the real motivation for the Rule is that it creates a free farm system – a risk-free laboratory for the development of younger players. *See, e.g.*, Clarett Al Mem. at 3 ("[T]he teams' agreement perpetuates and maintains the NCAA as its free minor league system."). When a collegiate player is injured or simply fizzles out, Clarett charges, it happens on someone else's (usually the player's) dime. Whether Clarett is right or wrong in his speculation is irrelevant to deciding whether the Rule violates the antitrust laws. The question here is whether the party who has restrained competition can offer a legitimate procompetitive justification for that action.

[182] *See Law*, 134 F.3d at 1021 ("Justifications offered under the rule of reason may be considered only to the extent that they tend to show that, on balance, 'the challenged restraint enhances competition.'") (quoting *NCAA*, 468 U.S. at 104, 104 S.Ct. 2948).

injuries – are, for two reasons, also ineffective. *First*, the League may not justify the anticompetitive effects of a policy by arguing that it has procompetitive effects *in a different market*.[183] Yet this is precisely what the NFL is advocating. The League argues that the Rule, by allegedly limiting the occurrence of player injuries, maintains the high quality of its "entertainment product," and thus presumably enables the League to better compete with other providers of sports entertainment such as other professional sports leagues or amateur football. The Rule, according to the NFL, thus limits competition in the player personnel market but enhances competition in the market for sports entertainment.[184] Even if it could be said with certainty that the Rule is procompetitive in this sense – and the League has certainly submitted no evidence to that effect – the League may not enact a policy that, effectively, "determine[s] the respective values of competition in various sectors of the economy."[185]

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[183] *See United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972) ("[T]he freedom guaranteed each and every business, no matter how small, is the freedom to compete–to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.").

[184] The NFL's reference to "protecting the NFL's entertainment product" is somewhat obscure. The NFL never explains how protecting its entertainment product enhances competition.

[185] *Topco*, 405 U.S. at 610-11, 92 S.Ct. 1126. A fifth potential justification for the Rule – alluded to only obliquely in the League's papers – is that the Rule, by excluding the most talented college players from the NFL, "sustains the NCAA's ability to compete in the entertainment market." Reply Memorandum in Support of the National Football League's Motion for Summary

Second, the NFL's desire to keep its costs down is not a legitimate procompetitive justification.[186] The fact that the League and its teams will save money by excluding players does not justify that exclusion. Indeed, the vast majority of anticompetitive policies are instituted because they will be profitable to the violators. As one scholar explains,

> The exercise of market power by a group of buyers virtually always results in lower costs to the buyers – a consequence which arguably is beneficial to the members of the industry and ultimately their consumers. If holding down costs by the exercise of market power over suppliers, rather than just by increased efficiency, is a procompetitive effect justifying joint conduct, then section 1 can never apply to input markets or buyer cartels. That is not and cannot be the law.[187]

Because the League has failed to offer *any* legitimate procompetitive justifications for the Rule, Clarett must prevail.[188] There is no need to proceed to trial or engage in

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Judgment (Antitrust Injury) at 7, n.7. That justification fails for the same reason just discussed, namely, that it sacrifices competition in one market for the sake of increased competition in another.

[186] *See Law*, 134 F.3d at 1022 ("[C]ost-cutting by itself is not a valid procompetitive justification.").

[187] Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 *Tul. L.Rev.* 2631, 2643 (1996).

[188] *See Chicago Prof'l Sports*, 961 F.2d at 674 (holding that when a plaintiff has demonstrated a naked restraint on trade, "[u]nless there are sound justifications, the court condemns the practice without ado."); *see generally* Phillip Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* 37-38 (1981) ("[T]he rule of reason can sometimes be applied in the twinkling of an eye.") (quoted in *NCAA*, 468 U.S. at 110 n. 39, 104 S.Ct. 2948).

fact-finding because the League has failed, as a matter of law, to offer any procompetitive justifications for the Rule. Accordingly, no jury is required to find that the anticompetitive effects of the Rule outweigh its procompetitive benefits.[189]

c. Less Restrictive Alternatives to the Rule Exist

Nonetheless, even if a procompetitive justification for the Rule existed, summary judgment for Clarett would be appropriate because an alternative to the Rule exists that is less prejudicial to competition. The antitrust laws do not tolerate a policy that restrains trade – even if there is some procompetitive benefit – when a policy that results in less prejudice to competition would be equally effective.[190]

All of the League's justifications for the Rule boil down to the same basic concern: younger players are not physically or mentally ready to play in the NFL. But as the NFL's own affiant concedes, the "timeframe" for a player's physical and psychological maturation "varies from individual to

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[189] *See, e.g.*, *Law*, 134 F.3d 1010 (affirming grant of summary judgment to antitrust plaintiff); *PSC Inc. v. Symbol Tech., Inc.*, 26 F. Supp. 2d 505 (W.D.N.Y.1998) (granting summary judgment to antitrust plaintiff); *cf. Capital Imaging*, 996 F.2d 537 (affirming grant of summary judgment to defendant after engaging in rule of reason analysis); *see generally Barry v. Blue Cross of Cal.*, 805 F.2d 866, 871 (9th Cir.1986) ("Occasionally, conduct is so clearly either reasonable or unreasonable that a court can dispose of the issue on summary judgment."); *PSC*, 26 F. Supp. 2d at 511 ("Application of the rule of reason is 'often erroneously assumed to require refined fact finding and balancing[,] ... [and] some rule-of-reason cases can be disposed of merely on the basis of the parties' arguments and, more often, on the basis of a limited summary judgment record.'") (quoting 7 Areeda & Hovenkamp, *Antitrust Law* § 1508) (alteration in original).

[190] *See Capital Imaging*, 996 F.2d at 543.

individual."[191] That being so, age is obviously a poor proxy for NFL-readiness, as is a restriction based solely on height or weight.[192] Medical examinations and tests are available to measure an individual player's maturity.[193] The League could easily use those tests to screen out players who are not prepared to play in the NFL. And while Dr. Metzl asserts that such tests are "intrusive,"[194] there is little doubt that potential draftees would voluntarily submit to testing in order to compete for a spot in the League.[195]

By requiring draft prospects to submit to these examinations, the League could provide valuable information about player maturity to its teams and allow them to decide whether a prospect is worth selecting. In such a scenario, no player would be automatically excluded from the market and each team could decide what level of risk it is willing to tolerate. The fact that there is a less restrictive alternative only underscores that there is no procompetitive justification for the Rule, and that it violates the antitrust laws.

V. CONCLUSION

For the reasons just explained, Clarett's motion for summary judgment is granted and the NFL's motions are

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[191] Metzl Decl. ¶ 6.

[192] *See id.* ¶ 12.

[193] *See id.* ¶ 17.

[194] *See id.*

[195] Indeed, it has been noted that potential draft picks are already subjected to extensive physical, medical and psychological testing. Each of the players that attend the NFL's annual draft combines – where prospective draftees are evaluated by the teams – are subjected to a battery of physical examinations, psychological profiles, and interviews. *See* Vic Carucci, *Combine Still Critical to Evaluating Talent* (Feb. 18, 2003), *at* http://www.nfl.com/draft/story/6197027.

denied. Because the Rule violates the antitrust laws, it cannot preclude Clarett's eligibility for the 2004 NFL draft. Accordingly, it is hereby ORDERED that Clarett is eligible to participate in the 2004 NFL draft. Clarett also requests damages as a result of his exclusion from the 2003 NFL draft. Because the parties have not yet addressed this issue, it is unclear whether there are material issues of fact with respect to damages. A conference is scheduled in Courtroom 15C on February 12, 2004 at 10:00 a.m.

SO ORDERED:

/s/
Shira A. Scheindlin
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2003

Argued: April 19, 2004 Decided: **May 24, 2004**

Docket No. 04-0943

MAURICE CLARETT,

Plaintiff-Appellee,

– v. –

NATIONAL FOOTBALL LEAGUE,

Defendant-Appellant.

Before:

SACK, SOTOMAYOR, *Circuit Judges*, and KAPLAN, *District Judge*.*

* The Honorable Lewis A. Kaplan, Judge of the United States District Court for the Southern District of New York, sitting by designation.

Defendant-appellant National Football League ("NFL") appeals from a judgment of the United States District Court of the Southern District of New York (Scheindlin, J.) granting summary judgment in favor of plaintiff-appellee Maurice Clarett on his claim that the NFL's eligibility rules, which prevent him from entering the NFL draft because he is not more than three football seasons removed from high school, violate the antitrust laws. We hold that the challenged rules are shielded from the antitrust laws by the non-statutory labor exemption and on that basis REVERSE and REMAND for the district court to enter judgment in favor of defendant. As the NFL is entitled to summary judgment, we further VACATE the district court's order declaring Clarett eligible to participate in the 2004 NFL draft that was stayed pending appeal.

REVERSED, in part, VACATED, in part, and REMANDED.

SOTOMAYOR, *Circuit Judge*:

Defendant-appellant National Football League ("NFL" or "the League") appeals from a judgment of the United States District Court for the Southern District of New York (Scheindlin, J.) ordering plaintiff-appellee Maurice Clarett ("Clarett") eligible to enter this year's NFL draft on the ground that the NFL's eligibility rules requiring Clarett to wait at least three full football seasons after his high school graduation before entering the draft violate antitrust laws. In reaching its conclusion, the district court held, *inter alia*, that the eligibility rules are not immune from antitrust scrutiny under the non-

statutory labor exemption.[196] We disagree and reverse.

BACKGROUND

Clarett, former running back for Ohio State University ("OSU") and Big Ten Freshman of the Year, is an accomplished and talented amateur football player.[197] After gaining national attention as a high school player, Clarett became the first college freshman since 1943 to open as a starter at the position of running back for OSU. He led that team through an undefeated season, even scoring the winning touchdown in a double-overtime victory in the 2003 Fiesta Bowl to claim the national championship.[198] Prior to the start of his second college season, however, Clarett was suspended from college play by OSU for reasons widely reported but not relevant here.[199] Forced to sit out his entire sophomore season, Clarett is now interested in turning professional by entering the NFL draft. Clarett is precluded from so doing, however, under the NFL's current rules governing draft eligibility.

Founded in 1920, the NFL today is comprised of 32 member clubs and is by far the most successful professional

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[196] Because we find that the eligibility rules are immune from antitrust scrutiny under the non-statutory labor exemption, we do not express an opinion on the district court's legal conclusions that Clarett alleged a sufficient antitrust injury to state a claim or that the eligibility rules constitute an unreasonable restraint of trade in violation of the antitrust laws.

[197] These facts, except where otherwise noted, are undisputed and taken from the opinion of the district court. *See Clarett v. Nat'l Football League*, 306 F.Supp.2d 379, 382 (S.D.N.Y. 2004).

[198] *See* Joe Drape, *Extra! Extra! It's Ohio State*, *N.Y. Times*, January 4, 2003, at D1.

[199] *See* Mike Freeman, *Buckeyes Suspend Clarett For Year*, *N.Y. Times*, Sept. 11, 2003, at D1.

football league in North America.[200] Because of the League's fiscal success and tremendous public following, a career as an NFL player "represents an unparalleled opportunity for an aspiring football player in terms of salary, publicity, endorsement opportunities, and level of competition." *Clarett*, 306 F. Supp. 2d at 384. But since 1925, when Harold "Red" Grange provoked controversy by leaving college to join the Chicago Bears,[201] the NFL has required aspiring professional football players to wait a sufficient period of time after graduating high school to accommodate and encourage college attendance before entering the NFL draft. For much of the League's history, therefore, a player, irrespective of whether he actually attended college or not, was barred from entering the draft until he was at least four football seasons removed from high school. The eligibility rules were relaxed in 1990, however, to permit a player to enter the draft three full seasons after that player's high school graduation.

Clarett "graduated high school on December 11, 2001, two-thirds of the way through the 2001 NFL season" and is a season shy of the three necessary to qualify under the draft's eligibility rules. Clarett Decl. at ¶ 6. Unwilling to forego the prospect of a year of lucrative professional play or run the risk of a career-compromising injury were his entry into the draft delayed until next year, Clarett filed this suit alleging that the NFL's draft eligibility rules are an unreasonable restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 4 of the Clayton Act, 15 U.S.C. § 15.

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[200] *See generally, United States Football League v. Nat'l Football League*, 842 F.2d 1335, 1343-45 (2d Cir. 1988) (recounting history of professional football leagues in the United States).

[201] *See* Gerald Eskenazi, *Red Grange, Football Hero of 1920's, Dead at 87, N.Y. Times*, Jan. 29, 1991, at B5.

Because the major source of the parties' factual disputes is the relationship between the challenged eligibility rules and the current collective bargaining agreement governing the terms and conditions of employment for NFL players, some elaboration on both the collective bargaining agreement and the eligibility rules is warranted. The current collective bargaining agreement between the NFL and its players union was negotiated between the NFL Management Council ("NFLMC"), which is the NFL member clubs' multi-employer bargaining unit, and the NFL Players Association ("NFLPA"), the NFL players' exclusive bargaining representative. This agreement became effective in 1993 and governs through 2007. Despite the collective bargaining agreement's comprehensiveness with respect to, *inter alia*, the manner in which the NFL clubs select rookies through the draft and the scheme by which rookie compensation is determined, the eligibility rules for the draft do not appear in the agreement.

At the time the collective bargaining agreement became effective, the eligibility rules appeared in the NFL Constitution and Bylaws, which had last been amended in 1992.[202] Specifically, Article XII of the Bylaws ("Article XII"), entitled "Eligibility of Players," prohibited member clubs from selecting any college football player through the draft process who had not first exhausted all college football eligibility, graduated from college, or been out of high school for five football seasons. Clubs were further barred from drafting any person who either did not attend college, or attended college but did not play football, unless that person had been out of

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[202] After the Constitution and Bylaws were amended in 1992, a revised copy was sent by the NFL Commissioner to all club owners, presidents and general managers. A memorandum from the Commissioner that accompanied the revised Constitution and Bylaws noted that changes had been made to the eligibility rules.

high school for four football seasons. Article XII, however, also included an exception that permitted clubs to draft players who had received "Special Eligibility" from the NFL Commissioner. In order to qualify for such special eligibility, a player was required to submit an application before January 6 of the year that he wished to enter the draft and "at least three NFL seasons must have elapsed since the player was graduated from high school." The Commissioner's practice apparently was, and still is, to grant such an application so long as three full football seasons have passed since a player's high school graduation.[203] Appellant's Brief, at 7 n. 3.

Although the eligibility rules do not appear in the text of the collective bargaining agreement, the NFL Constitution and Bylaws that at the time of the agreement's adoption contained the eligibility rules are mentioned in three separate provisions relevant to our discussion. First, in Article III, Section 1 (Scope of Agreement), the collective bargaining agreement states:

> This Agreement represents the complete understanding of the parties as to all subjects covered herein, and there will be no change in the terms and conditions of this Agreement without mutual consent .... [T]he NFLPA and the Management Council waive any rights to bargain with one another concerning any subject covered or not covered in this Agreement for the duration of this Agreement, *including the provisions of the NFL Constitution and Bylaws*;

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[203] At oral argument, counsel for Clarett clarified that his challenge is not limited to the "Special Eligibility" rule, as his papers on appeal might suggest, but extends to any and all of the eligibility rules that would keep Clarett from entering the NFL draft this year. We refer to these rules collectively as "the eligibility rules."

> provided, however, that if any proposed change in the NFL Constitution and Bylaws during the term of this Agreement could significantly affect the terms and conditions of employment of NFL players, then the [NFLMC] will give the NFLPA notice of and negotiate the proposed change in good faith.

(emphasis added). Second, Article IV, Section 2 (No Suit) provides generally that "neither [the NFLPA] nor any of its members" will sue or support a suit "relating to the presently existing provisions of the Constitution and Bylaws of the NFL as they are currently operative and administered." Third, Article IX, Section 1 (Non-Injury Grievance) makes "[a]ny dispute ... involving the interpretation of, application of, or compliance with, ... any applicable provision of the NFL Constitution and Bylaws pertaining to terms and conditions of employment of NFL players" subject to the grievance procedures afforded under the collective bargaining agreement.

Before the collective bargaining agreement became effective, a copy of the Constitution and Bylaws, as amended in 1992, was provided by the NFL to the NFLPA along with a letter, dated May 6, 1993, that "confirm[ed] that the attached documents are the presently existing provisions of the Constitution and Bylaws of the NFL referenced in Article IV, Section 2, of the Collective Bargaining Agreement." The May 6 letter was signed by representatives of the NFL and the NFLPA. The only other evidence presented to the district court by the NFL concerning the negotiation of the collective bargaining agreement were the two declarations of Peter Ruocco, Senior Vice President of Labor Relations at the NFLMC. In the second declaration, Ruocco attests that "[d]uring the course of collective bargaining that led to the [collective bargaining agreement], the [challenged] eligibility

rule itself was the subject of collective bargaining." Ruocco Decl. at ¶ 8.

In 2003, ten years into the life of the collective bargaining agreement, Article XII was amended. Although the substance of most of the eligibility rules was retained, the "Special Eligibility" provision was removed and substituted with the following[204]:

> If four seasons have not elapsed since the player discontinued high school, he is ineligible for selection, but may apply to the Commissioner for special eligibility.

The Bylaws then refer to a separate memorandum issued by the Commissioner on February 16, 1990 – three years before the current collective bargaining agreement became effective –pursuant to his authority under the Bylaws to establish necessary policies and procedures. That memorandum states that "[a]pplications for special eligibility for the 1990 draft will be accepted only from college players as to whom three full *college* seasons have elapsed since their high school graduation." (emphasis added).[205] It is this version of the

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[204] Although Article III, Section 1 of the collective bargaining agreement obligates the NFL to notify the players union of, and to bargain over, any change to the Bylaws that "could significantly affect the terms and conditions" of players' employment, the record is silent as to whether the NFL or the players union considered the changes to Article XII significant, whether the NFL notified the players union of these changes, or whether the changes were bargained over.

[205] Whereas the pre-2003 version of the Constitution and Bylaws authorized special eligibility for players after the passing of "three NFL seasons," the current eligibility rules as established by the Bylaws and the Commissioner's memorandum require that "three

eligibility rules that the NFL relies upon in refusing Clarett special eligibility for this year's draft, and it is this version of the eligibility rules that Clarett seeks to invalidate.

After Clarett filed this suit in September 2003, the parties conducted limited discovery and thereafter moved for summary judgment. Clarett sought summary judgment on the merits of his antitrust claim. The NFL asserted that Clarett lacked "antitrust standing" and that, as a matter of law, the eligibility rules were immune from antitrust attack by virtue of the non-statutory labor exemption. On February 5, 2004, the district court granted summary judgment in favor of Clarett and ordered him eligible to enter this year's draft. *Clarett*, 306 F. Supp. 2d at 410-11. First, relying on the test articulated by the Eighth Circuit in *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), the district court rejected the NFL's argument that the antitrust laws are inapplicable to the eligibility rules because they fall within the non-statutory labor exemption to the antitrust laws. *Clarett*, 306 F. Supp. 2d at 397. Specifically, the district court held that the exemption does not apply because the eligibility rules: 1) are not mandatory subjects of collective bargaining, 2) affect only "complete strangers to the bargaining relationship," and 3) were not shown to be the product of arm's-length negotiations between the NFL and its players union. *Id.* at 393-97.

Second, the district court ruled against the NFL on its contention that Clarett lacked standing because he had not demonstrated a sufficient "antitrust injury" to maintain this suit, holding that the "inability to compete in the market" for NFL

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full college seasons" have elapsed. Clarett is neither three NFL seasons nor three college seasons out of high school. Because the difference is immaterial for our purposes, we use the less specific "three football seasons" when referring to the amount of time after graduating high school a player must wait before entering the draft.

players' services is sufficient injury for antitrust purposes. *Id.* at 403.

Third, on the merits of Clarett's antitrust claim, the district court found that the eligibility rules were so "blatantly anticompetitive" that only a "quick look" at the NFL's procompetitive justifications was necessary to reach the conclusion that the eligibility rules were unlawful under the antitrust laws. *Id.* at 408. The NFL had argued that because the eligibility rules prevent less physically and emotionally mature players from entering the league, they justify any incidental anticompetitive effect on the market for NFL players. *Id.* In so doing, according to the NFL, the eligibility rules guard against less-prepared and younger players entering the League and risking injury to themselves, prevent the sport from being devalued by the higher number of injuries to those young players, protect its member clubs from having to bear the costs of such injuries, and discourage aspiring amateur football players from enhancing their physical condition through unhealthy methods. *Id.* at 408-09. The district court held that all of these justifications were inadequate as a matter of law, concluding that the NFL's purported concerns could be addressed through less restrictive but equally effective means. *Id.* at 410. Finding that the eligibility rules violated the antitrust laws, the district court entered judgment in favor of Clarett, and, recognizing that this year's draft was then just over two months away, issued an order deeming Clarett eligible to participate in the draft.

The NFL subsequently moved for a stay pending appeal, which the district court denied. *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 411 (S.D.N.Y.2004). After filing a notice of appeal, the NFL petitioned to have the appeal heard on an expedited basis and again moved to stay the district court's order pending appeal. On March 30, 2004, we agreed to

hear the appeal on an expedited basis and set a substantially compressed briefing schedule. Following oral argument on April 19, we granted the NFL's motion to stay the district court's order, citing the NFL's "likelihood of success on the merits" and noting that the resulting harm to Clarett was mitigated by the NFL's promise to "hold a supplemental draft for [Clarett] and all others similarly situated" were the district court's judgment affirmed. Order of April 19, 2004. Clarett thereafter made successive applications to two Justices of the Supreme Court to lift this Court's stay order. Both applications were denied. Clarett did not participate in the NFL draft held on April 24 and 25, 2004.

DISCUSSION

Clarett argues that the NFL clubs are horizontal competitors for the labor of professional football players and thus may not agree that a player will be hired only after three full football seasons have elapsed following that player's high school graduation. That characterization, however, neglects that the labor market for NFL players is organized around a collective bargaining relationship that is provided for and promoted by federal labor law, and that the NFL clubs, as a multi-employer bargaining unit, can act jointly in setting the terms and conditions of players' employment and the rules of the sport without risking antitrust liability. For those reasons, the NFL argues that federal labor law favoring and governing the collective bargaining process precludes the application of the antitrust laws to its eligibility rules. We agree.

The district court's denial of the NFL's motion for summary judgment is reviewed *de novo*, and all factual inferences are drawn in favor of Clarett. *See Amnesty America v. Town of West Hartford*, 361 F.3d 113, 122 (2d Cir.2004).

I.

Although "[t]he interaction of the [antitrust laws] and federal labor legislation is an area of law marked more by controversy than by clarity," *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 959 (2d Cir.1987) (citing R. Gorman, *Labor Law, Unionization and Collective Bargaining* 631-35 (1976)), it has long been recognized that in order to accommodate the collective bargaining process, certain concerted activity among and between labor and employers must be held to be beyond the reach of the antitrust laws. *See United States v. Hutcheson*, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 (1941); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311 (1940). Courts, therefore, have carved out two categories of labor exemptions to the antitrust laws: the so-called statutory and non-statutory exemptions.[206] We deal here only with the non-statutory exemption.

The non-statutory exemption has been inferred "from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining; which require good-faith bargaining over wages, hours, and working conditions; and which delegate related rulemaking and

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[206] The statutory exemption, so named because it is derived from the texts of the Clayton Act, 15 U.S.C. § 17, 29 U.S.C. § 52, and the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, shields from the antitrust laws certain unilateral conduct of labor groups such as boycotts and picketing. *See H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 714-15, 101 S.Ct. 2102, 68 L. Ed. 2d 558 (1981). Because the statutory exemption does not provide any protection for "concerted action or agreements between unions and nonlabor parties," *Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 622, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975), the NFL does not rely on the statutory exemption in arguing that its eligibility rules are immune from the antitrust laws.

interpretive authority to the National Labor Relations Board." *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236, 116 S.Ct. 2116, 135 L. Ed. 2d 521 (1996) (internal citations omitted). The exemption exists not only to prevent the courts from usurping the NLRB's function of "determin[ing], in the area of industrial conflict, what is or is not a 'reasonable' practice," but also "to allow meaningful collective bargaining to take place" by protecting "some restraints on competition imposed through the bargaining process" from antitrust scrutiny. *Id.* at 237, 116 S.Ct. 2116.

The Supreme Court has never delineated the precise boundaries of the exemption, and what guidance it has given as to its application has come mostly in cases in which agreements between an employer and a labor union were alleged to have injured or eliminated a competitor in the employer's business or product market. In the face of such allegations, the Court has largely permitted antitrust scrutiny in spite of any resulting detriment to the labor policies favoring collective bargaining.

In the first case to deal squarely with the non-statutory exemption, *Allen Bradley Co. v. Local No. 3, International Brotherhood of Electrical Workers*, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945), the New York City electrical workers union negotiated a series of agreements in which local manufacturers and contractors agreed to deal only with other manufacturers and contractors that employed the union's members. *Id.* at 799-800, 65 S.Ct. 1533. A non-local manufacturer that was excluded from the market as a result successfully sued under the antitrust laws, establishing that these agreements were "but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in New York City, to bar all other business men from that area, and to charge the public prices above a competitive level." *Id.* at 809, 65 S.Ct. 1533.

Although the Court recognized that the union sought the agreements out of "a desire to get and hold jobs for themselves at good wages and under high working standards," it held that the non-statutory exemption did not apply where unions "combine with employers and with manufacturers of goods to restrain competition in, and to monopolize the marketing of, such goods." *Id.* at 798, 65 S.Ct. 1533.

Twenty years later, the Court considered two cases dealing with the non-statutory exemption. Although the Court again refused to apply the non-statutory exemption in the first, *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L. Ed. 2d 626 (1965), it did apply the exemption in *Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 85 S.Ct. 1607, 14 L.Ed.2d 626 (1965). In *Pennington*, a small coal mine operator claimed that a miners union violated the antitrust laws by agreeing with large coal mine companies that the union would demand a higher wage scale from small coal mine operators in an effort to drive the small mine operators from the market. Echoing its decision in Allen Bradley, the Court held that while "a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers" without incurring antitrust liability, "a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units." *Pennington*, 381 U.S. at 665, 85 S.Ct. 1585.

The Court, however, reached a different result in Jewel Tea, which involved a challenge to a collective bargaining agreement between the butchers union and meat sellers in Chicago, whereby the meat sellers agreed to limit the operation of meat counters to certain hours. *See Jewel Tea*, 381 U.S. at

679-80, 85 S.Ct. 1607. The union sought the restriction not only to cabin the hours in the workday but also to diminish the threat posed to members' job security by evening sales of prepackaged meat and the nighttime use of unskilled labor. *Id.* at 682, 85 S.Ct. 1607. Jewel Tea was one of the meat sellers that signed the agreement. It did so, however, only under pressure from the union and then challenged the hours restriction on antitrust grounds. Jewel Tea notably did not allege that the hours restriction eliminated competition among the meat sellers that made up the bargaining unit or that the union sought the hours restriction from Jewel Tea at the behest of other meat sellers. *Id.* at 688, 85 S.Ct. 1607.

A majority of the Court agreed that the hours restriction fell within the non-statutory exemption, but the Justices disagreed as to the reason for applying the exemption. Justice White, writing for himself and two other Justices, advocated that the application of the non-statutory exemption should be determined by balancing the "interests of union members" served by the restraint against "its relative impact on the product market." *Id.* at 690 n. 5, 85 S.Ct. 1607. Applying that test, Justice White held that the hours restriction was

> so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act. *Id.* at 689-90, 85 S.Ct. 1607.[207]

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[207] When confronted with allegations that agreements between

Concurring in *Jewel Tea* but dissenting in *Pennington*, Justice Goldberg, writing for himself and two Justices, found that no such balancing was necessary. Because federal labor law obligates the union and employer to bargain in good faith and permits unions to strike over those issues that relate to workers' wages, hours, or terms and conditions of employment, Justice Goldberg found that it would "stultify the congressional scheme" to expose collective bargaining agreements on these so-called mandatory bargaining subjects to antitrust liability. *Id.* at 712, 85 S.Ct. 1585. Therefore, according to Justice Goldberg, all "collective bargaining activity concerning mandatory subjects of bargaining under the [labor laws] is not subject to the antitrust laws." *Id.* at 710, 85 S.Ct. 1585.

Another ten years later, in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 95 S.Ct. 1830, 44 L. Ed. 2d 418 (1975), the Court held the non-statutory exemption did not protect a union's agreement with a contractor that bound the contractor to deal only with subcontractors that employed the union's members. The challenged agreement was not a collective bargaining agreement, and the union did not represent the contractor's employees; rather, the contractor acceded to the agreement only after the union picketed one of its facilities. *Id.* at 619, 95 S.Ct. 1830. The Court refused to apply the exemption to this "kind of direct restraint on the business market[, which] has substantial anticompetitive effects, both actual and potential,

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labor and employers damaged competition in the business or product market, we have previously regarded Justice White's decision in Jewel Tea as setting forth the "classic formulation" of the non-statutory exemption. *See Local 210, Laborers' Int'l Union v. Labor Relations Div. Associated Gen. Contractors of Am.*, 844 F.2d 69, 79 (2d Cir.1988); *Berman Enters. Inc. v. Local 333, United Marine Div., Int'l Longshoremen's Ass'n*, 644 F.2d 930, 935 n. 8 (2d Cir.1981).

that would not follow naturally from the elimination of competition over wages and working conditions." *Id.* at 625, 95 S.Ct. 1830.

Contending that these cases establish the applicable boundaries of the non-statutory exemption to be applied in the present case, Clarett argues that the NFL's eligibility rules lack all of the characteristics that led Justice White to apply the exemption in Jewel Tea. Clarett, furthermore, maintains that the boundaries of the exemption were properly identified in, and thus we should follow, the Eighth Circuit's decision in *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976). Mackey involved a challenge brought by NFL players to the League's so-called "Rozelle Rule," which required NFL clubs to compensate any club from which they hired away a player whose contract had expired. *Id.* at 609. Presenting arguments not dissimilar from those made in the present case, the players in *Mackey* alleged that the Rozelle Rule constituted an unlawful conspiracy amongst the NFL clubs to restrain players' abilities freely to contract their services. The NFL, for its part, asserted that the Rozelle Rule was exempt from the antitrust laws by virtue of its inclusion in the League's collective bargaining agreement with the players union. Noting that the Supreme Court had to that point applied the non-statutory exemption only in *Jewel Tea*, the Eighth Circuit gleaned from the Court's decisions, and Justice White's opinion in *Jewel Tea* in particular, that in order to fall within the non-statutory exemption, a restraint must: 1) primarily affect only the parties to the collective bargaining relationship, 2) concern a mandatory subject of collective bargaining, and 3) be the product of bona fide arm's-length bargaining. *Id.* at 614. Although the Eighth Circuit found that the Rozelle Rule satisfied the first two prongs, it nonetheless refused to apply the exemption after finding that the Rozelle Rule was not the product of arm's-length negotiations. *Id.* at 615-16. Noting that

the Rozelle Rule predated the advent of the collective bargaining relationship between the NFL and its players union, the Eighth Circuit found that the record lacked sufficient evidence to conclude that the players union had received some quid pro quo in exchange for including the Rule in the collective bargaining agreement. *Id.* at 616. For that reason, the Eighth Circuit held that the Rozelle Rule did not fall within the non-statutory exemption, and the Rule was invalidated on antitrust grounds. *Id.* at 621-22.

Relying on *Mackey*, the district court below held that the non-statutory exemption provides no protection to the NFL's draft eligibility rules, because the eligibility rules fail to satisfy any of the three *Mackey* factors. *Clarett*, 306 F. Supp. 2d at 397. Specifically, the district court found that the rules exclude strangers to the bargaining relationship from entering the draft, do not concern wages, hours or working conditions of current NFL players, and were not the product of bona fide arm's-length negotiations during the process that culminated in the current collective bargaining agreement. *Id.* at 395-97.

We, however, have never regarded the Eighth Circuit's test in *Mackey* as defining the appropriate limits of the non-statutory exemption. *See Local 210, Laborers' Int'l Union*, 844 F.2d at 80 n. 2 (declining to follow *Mackey* in favor of balancing test articulated in *Jewel Tea*); *see also United States Football League v. Nat'l Football League*, 842 F.2d 1335, 1372 (2d Cir.1988) (recognizing *Mackey* is "not consistent with our decision in *Wood v. National Basketball Ass'n*"). Moreover, we disagree with the Eighth Circuit's assumption in *Mackey* that the Supreme Court's decisions in *Connell*, *Jewel Tea*, *Pennington*, and *Allen Bradley* dictate the appropriate boundaries of the non-statutory exemption for cases in which the only alleged anticompetitive effect of the challenged restraint is on a labor market organized around a collective

bargaining relationship. Indeed, we have previously recognized that these decisions are of limited assistance in determining whether an athlete can challenge restraints on the market for professional sports players imposed through a collective bargaining process, because all "involved injuries to employers who asserted that they were being excluded from competition in the product market."[208] *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 963 (2d Cir.1987) (emphasis in original).[209]

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[208] Although Justice White in his opinion in *Jewel Tea* stated that the plaintiff had "not allege[d] that it ha[d] been injured by the elimination of competition among the other employers within the unit with respect to marketing hours," *Jewel Tea*, 381 U.S. at 688, 85 S.Ct. 1607, Justice Goldberg in his concurrence noted that it was conceded on that record that the uniform hours restriction challenged in that cases aided "small employers at the expense of the large," *id.* at 699, 85 S.Ct. 1607.

[209] We are not the only circuit to have drawn this distinction. *See, e.g., Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1056 (D.C. Cir.1995), *aff'd*, 518 U.S. 231, 116 S.Ct. 2116, 135 L.Ed.2d 521 (1996) ("[T]he nonstatutory labor exemption waives antitrust liability for restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining."); *Mid-America Reg'l Bargaining Ass'n v. Will County Carpenters Dist. Council*, 675 F.2d 881, 893 (7th Cir.1982) ("[Non-statutory exemption applies where] restraint ... alleged is not a 'direct restraint on the business market' but rather a direct restraint on the labor market, with only tangential effects on the business market."); *Consol. Express, Inc. v. N.Y. Shipping Ass'n*, 602 F.2d 494, 513 (3d Cir.1979), *vacated on other grounds*, 448 U.S. 902, 100 S.Ct. 3040, 65 L.Ed.2d 1131 (1980) ("The term nonstatutory exemption ... is a shorthand description of an interpretation of the Sherman Act, making that statute inapplicable to restraints imposed in the interest of lawful union monopoly power in the labor market.").

Clarett does not contend that the NFL's draft eligibility rules work to the disadvantage of the NFL's competitors in the market for professional football or in some manner protect the NFL's dominance in that market. *Compare N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249 (2d Cir.1982). He challenges the eligibility rules only on the ground that they are an unreasonable restraint upon the market for players' services. *See Clarett*, 306 F.Supp.2d at 399. Thus, we need not decide here whether the Mackey factors aptly characterize the limits of the exemption in cases in which employers use agreements with their unions to disadvantage their competitors in the product or business market, because our cases have counseled a decidedly different approach where, as here, the plaintiff complains of a restraint upon a unionized labor market characterized by a collective bargaining relationship with a multi-employer bargaining unit. *See Caldwell v. Am. Basketball Ass'n*, 66 F.3d 523 (2d Cir.1995); *Nat'l Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir.1995); *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954 (2d Cir.1987). Moreover, as the discussion below makes clear, the suggestion that the Mackey factors provide the proper guideposts in this case simply does not comport with the Supreme Court's most recent treatment of the non-statutory labor exemption in *Brown v. Pro Football, Inc.*, 518 U.S. 231, 116 S.Ct. 2116, 135 L. Ed. 2d 521 (1996).

II.

Our decisions in *Caldwell*, *Williams*, and *Wood* all involved players' claims that the concerted action of a professional sports league imposed a restraint upon the labor market for players' services and thus violated the antitrust laws. In each case, however, we held that the non-statutory labor exemption defeated the players' claims. Our analysis in each case was rooted in the observation that the relationships among the defendant sports leagues and their players were governed by

collective bargaining agreements and thus were subject to the carefully structured regime established by federal labor laws. We reasoned that to permit antitrust suits against sports leagues on the ground that their concerted action imposed a restraint upon the labor market would seriously undermine many of the policies embodied by these labor laws, including the congressional policy favoring collective bargaining, the bargaining parties' freedom of contract, and the widespread use of multi-employer bargaining units. Subsequent to our decisions in this area, similar reasoning led the Supreme Court in *Brown v. Pro Football, Inc.*, 518 U.S. 231, 116 S.Ct. 2116, 135 L. Ed. 2d 521 (1996), to hold that the non-statutory exemption protected the NFL's unilateral implementation of new salary caps for developmental squad players after its collective bargaining agreement with the NFL players union had expired and negotiations with the union over that proposal reached an impasse. We need only retrace the path laid down by these prior cases to reach the conclusion that Clarett's antitrust claims must fail.

A.

The plaintiff in *Wood*, O. Leon Wood, was a star college basketball player who, after being drafted by the Philadelphia 76ers, sued the NBA alleging that its policies regarding, *inter alia*, the entry draft process and team salary caps constituted unlawful agreements among horizontal competitors to eliminate competition for college players.[210] *Wood*, 809 F.2d at 956-58. All of the challenged policies, however, were included in a collective bargaining agreement and memorandum of understanding between the NBA and its players union. *Id.* at

[210] The challenge to the NBA draft in *Wood*, as with the challenge in *Williams*, discussed *infra*, did not include any claim against the rules governing eligibility for the draft.

957-58. Because these agreements were the result of the federally mandated bargaining process through which the union and the NBA, in light of the unique economic imperatives of professional basketball, negotiated a host of creative solutions to settle their differences, we held that to permit Wood to challenge particular aspects of their agreement on antitrust grounds would "subvert fundamental principles of our federal labor policy." *Id.* at 959.

Specifically, we found that Wood's claim that the NBA's agreements prevented him from becoming a free agent and negotiating directly with the teams for the best salary contravened the principle of federal labor law that once a majority of employees votes to unionize and elects a representative, individual employees – whether in the bargaining unit or not–no longer possess the right to negotiate with the employer for the best deal possible. *Id.* at 959-60 (citing 29 U.S.C. § 159(a)). Rather, the union representative is charged with the responsibility of seeking the best overall deal for employees, which often means that some employees or prospective employees may fare worse than they would in a competitive market free from restraints. *Id.* We further rejected Wood's contention that the non-statutory exemption did not preclude his challenge because he was not a member of the union when the collective bargaining agreement became effective, observing that new union members often find themselves disadvantaged vis-a-vis more senior union members and that collective bargaining units commonly disadvantage employees outside of, or about to enter, the union. *Id.* at 960.

We also reasoned that to allow Wood to cherry-pick the particular policies with which he took issue would run counter to the "freedom of contract" that labor law intends unions and employers to have during the collective bargaining process, because Wood could negate aspects of the "unique bundle of

compromises" struck between the NBA and its players on their way to a peaceful and efficient resolution of their differences. *Id.* at 961. Particularly because Wood challenged agreements concerning mandatory subjects of bargaining, to which labor law attaches a host of rights and obligations, we saw no place for the application of the antitrust laws and found the non-statutory exemption applicable. *Id.* at 962.

Eight years later, in *Williams*, a class of professional basketball players again brought an antitrust suit challenging, *inter alia*, the NBA's draft process and salary caps. *Williams*, 45 F.3d at 685-86. This time, however, the restraints challenged by the players were not encompassed in any effective agreement between the NBA and its players union, because the collective bargaining agreement had expired. *Id.* at 686. The challenged policies were implemented unilaterally by the NBA after negotiations with the players union on these subjects reached an impasse. *Id.* We nevertheless held that the NBA's conduct fell within the non-statutory exemption. *Id.* at 693. Foremost, we found that the players' antitrust claims were inconsistent with federal labor law because they imperiled the legitimacy of multi-employer bargaining, "a process by which employers band together to act as a single entity in bargaining with a common union." *Id.* at 688. From the standpoint of our labor and antitrust laws, we explained that such multi-employer bargaining units are a long-accepted and commonplace means of giving employers the tactical and practical advantages of collective action. *Id.* at 688-93. Moreover, in the context of sports leagues, we observed that multi-employer bargaining units serve the additional, important purpose of allowing the teams to establish and demand uniformity in the rules necessary for the proper functioning of the sport. *Id.* at 689. Second, we found that legality of conduct undertaken in the course of negotiations over a collective bargaining agreement is an issue committed to the specialized knowledge of the National Labor

Relations Board, for which federal labor law provides a "soup-to-nuts array of rules and remedies." *Id.* at 693. Because permitting courts to police that same conduct under the auspices of the antitrust laws would disrupt that remedial scheme, we held that the non-statutory exemption was applicable. *Id.* at 693.

That same year, in *Caldwell*, we heard the appeal of Joe L. Caldwell, a former professional basketball player who after four successful seasons of play was suspended from his team in 1974 and never returned to the game. *Caldwell*, 66 F.3d at 525-26. While a basketball player, Caldwell represented the players in labor negotiations with the league and claimed to have incurred the scorn of his league, the American Basketball Association ("ABA"), as a result. *Id.* at 526. He alleged that the teams consequently agreed among themselves, in violation of the antitrust laws, that he should be fired and then blacklisted from professional play. *Id.* Despite the district court's finding that the case could "be entirely resolved without any reference whatsoever to the" collective bargaining agreement between the ABA and its players union, *id.* at 529 n. 1, we held that the non-statutory exemption defeated Caldwell's claims, *id.* at 527.

In *Caldwell*, our analysis began with the observation that "[t]he inception of a collective bargaining relationship between employees and employers irrevocably alters the governing legal regime." *Id.* at 527-28 (quoting *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1054 (D.C. Cir.1995), *aff'd* 518 U.S. 231, 116 S.Ct. 2116, 135 L. Ed . 2d 521 (1996)). We found that as a consequence of the collective bargaining relationship between the ABA and its players union, Caldwell's claims, insofar as they concerned the "circumstances under which an employer may discharge or refuse to hire an employee," involved a mandatory bargaining subject. *Id.* at 529. Thus, federal labor law afforded Caldwell a host of administrative and

judicial remedies to contest the parties' agreements on the subject, as well as his firing and any team's refusal to rehire him. *Id.* Drawing upon our discussion of multi-employer bargaining units in Williams, we then observed that the legality vel non of his treatment did not become a question of antitrust law simply because the "employers acted jointly in refusing employment." *Id.* Because such issues are remediable under labor law, we concluded that the non-statutory exemption applied.

The following year, in Brown, the Supreme Court was presented with facts similar to Williams, and eight Justices agreed that the non-statutory exemption precludes antitrust claims against a professional sports league for unilaterally setting policy with respect to mandatory bargaining subjects after negotiations with the players union over those subjects reach impasse. *Brown*, 518 U.S. at 240-42, 116 S.Ct. 2116. There, a class of professional football players challenged the NFL's unilateral institution of a policy that permitted each team to establish a new squad of developmental players and capped those players' weekly salaries after negotiations with the players union over that proposal became deadlocked. *Id.* at 234-35, 116 S.Ct. 2116. Approaching the issue largely as a "matter of logic," *id.* at 237, 116 S.Ct. 2116, the Court found that to permit antitrust liability in such a case would call into question a great deal of conduct, such as multi-employer bargaining, that federal labor policy promotes and for which labor law provides an array of rules and remedies, *id.* at 237-42, 116 S.Ct. 2116. The Court held that the non-statutory labor exemption necessarily applied not only to protect such labor policies but also to prevent "antitrust courts" from usurping the NLRB's responsibility for policing the collective bargaining process. *Id.* at 240- 42, 116 S.Ct. 2116.

The Court also rejected a number of potential limits on

the exemption that were raised by the players and their supporters. First, the Court held that the exemption was not so narrow as to protect only agreements between the parties that are embodied in an existing collective bargaining agreement. *Id.* at 243-44, 116 S.Ct. 2116. Second, in finding that the League's post-impasse action was protected by the exemption, the Court dismissed the suggestion that the exemption should insulate the concerted action of employers only up to the point at which negotiations reach impasse or a "reasonable time" thereafter. *Id.* at 244-47, 116 S.Ct. 2116. Third, the Court rejected the notion that courts in applying the exemption could distinguish between bargaining "tactics," which the players argued should be exempt, and unilaterally imposed "terms." *Id.* at 247-48, 116 S.Ct. 2116. Finally, the Court refused the players' contention that the labor of professional sports players was unique and that the market for players' services therefore should be treated differently than other organized labor markets for purposes of the non-statutory exemption. *Id.* at 248-49, 116 S.Ct. 2116.

Although the Court in Brown held that the non-statutory exemption applied, it left the precise contours of the exemption undefined. *Id.* at 250, 116 S.Ct. 2116. In so doing, the Court found it unnecessary to embrace, and indeed expressed some reservations about, the broader holding of the court of appeals that the non-statutory exemption "waiv[es] antitrust liability for restraints on competition imposed through the collective-bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining." *Id.* at 235, 116 S.Ct. 2116.

Clarett argues that his case differs in material respects from *Brown*, but he does not argue, nor do we find, that the Supreme Court's treatment of the non-statutory exemption in that case gives reason to doubt the authority of our prior

decisions in *Caldwell*, *Williams*, and *Wood*. Because we find that our prior decisions in this area fully comport – in approach and result – with the Supreme Court's decision in *Brown*, we regard them as controlling authority. In light of the foregoing jurisprudence, we therefore proceed to the merits of this appeal.

B.

Clarett argues that he is physically qualified to play professional football and that the antitrust laws preclude the NFL teams from agreeing amongst themselves that they will refuse to deal with him simply because he is less than three full football seasons out of high school. Such an arbitrary condition, he argues, imposes an unreasonable restraint upon the competitive market for professional football players' services, and, because it excludes him from entering that market altogether, constitutes a per se antitrust violation. The issue we must decide is whether subjecting the NFL's eligibility rules to antitrust scrutiny would "subvert fundamental principles of our federal labor policy." *Wood*, 809 F.2d at 959. For the reasons that follow, we hold that it would and that the non-statutory exemption therefore applies.

Although the NFL has maintained draft eligibility rules in one form or another for much of its history, the "inception of a collective bargaining relationship" between the NFL and its players union some thirty years ago "irrevocably alter[ed] the governing legal regime." *Caldwell*, 66 F.3d at 527. Our prior cases highlight a number of consequences resulting from the advent of this collective bargaining relationship that are relevant to Clarett's litigation. For one, prospective players no longer have the right to negotiate directly with the NFL teams over the terms and conditions of their employment. That responsibility is instead committed to the NFL and the players union to accomplish through the collective bargaining process,

and throughout that process the NFL and the players union are to have the freedom to craft creative solutions to their differences in light of the economic imperatives of their industry. Furthermore, the NFL teams are permitted to engage in joint conduct with respect to the terms and conditions of players' employment as a multi-employer bargaining unit without risking antitrust liability. The arguments Clarett advances in support of his antitrust claim, however, run counter to each of these basic principles of federal labor law.

Because the NFL players have unionized and have selected the NFLPA as its exclusive bargaining representative, labor law prohibits Clarett from negotiating directly the terms and conditions of his employment with any NFL club, *see NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180, 87 S.Ct. 2001, 18 L. Ed. 2d 1123 (1967), and an NFL club would commit an unfair labor practice were it to bargain with Clarett individually without the union's consent, *see Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683, 64 S.Ct. 830, 88 L.Ed. 1007 (1944).[211] The terms and conditions of Clarett's employment are instead committed to the collective bargaining table and are reserved to the NFL and the players union's selected representative to negotiate. *Allis-Chalmers Mfg. Co.*, 388 U.S. at 180, 87 S.Ct. 2001.

The players union's representative possesses "powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Trans World Airlines, Inc. v. Indep. Fed'n of Flight Attendants*,

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[211] "To be sure, in sports leagues, unionized players generally engage in individual bargaining with teams. However, it must be emphasized that such individual bargaining is not an exercise of a right to free competition under the antitrust laws; rather, it is an exercise of a right derived from collective bargaining itself." *Caldwell*, 66 F.3d at 528.

489 U.S. 426, 458-59, 109 S.Ct. 1225, 103 L. Ed. 2d 456 (1989) (quoting *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202, 65 S.Ct. 226, 89 L.Ed. 173 (1944)). In seeking the best deal for NFL players overall, the representative has the ability to advantage certain categories of players over others, subject of course to the representative's duty of fair representation. *See Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L. Ed. 2d 842 (1967). The union representative may, for example, favor veteran players over rookies, *see Ford Motor Co. v. Huffman*, 345 U.S. 330, 338-39, 73 S.Ct. 681, 97 L.Ed. 1048 (1953), and can seek to preserve jobs for current players to the detriment of new employees and the exclusion of outsiders, *see Fibreboard Paper Prods. Corp v. NLRB*, 379 U.S. 203, 210-15, 85 S.Ct. 398, 13 L. Ed. 2d 233 (1964); *Wood*, 809 F.2d at 960 & n. 3. This authority and exclusive responsibility is vested in the players' representative "once a mandatory collective bargaining relationship is established and continues throughout the relationship." *Caldwell*, 66 F.3d at 528. For the duration of that relationship, federal labor law then establishes a " 'soup-to-nuts array' of rules, tribunals and remedies to govern [the collective bargaining] process." *Id.* at 529 (quoting *Williams*, 45 F.3d at 693).

Clarett's argument that antitrust law should permit him to circumvent this scheme established by federal labor law starts with the contention that the eligibility rules do not constitute a mandatory subject of collective bargaining and thus cannot fall within the protection of the non-statutory exemption. Contrary to the district court, however, we find that the eligibility rules are mandatory bargaining subjects.[212]

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[212] Because we conclude that the eligibility rules are mandatory subjects of collective bargaining, we have no occasion to address whether, or in what circumstances, the non-statutory exemption extends to permissive bargaining subjects. *See Feather v. United*

Though tailored to the unique circumstance of a professional sports league, the eligibility rules for the draft represent a quite literal condition for initial employment and for that reason alone might constitute a mandatory bargaining subject. *See Caldwell*, 66 F.3d at 529 (describing the mandatory bargaining subject "pertinent" to that case as "the circumstances under which an employer may ... refuse to hire an employee"); R. Gorman, *Labor Law* at 504 ("In accordance with the literal language of the Labor Act, the parties must bargain about the requirements or 'conditions' of initial employment."). But moreover, the eligibility rules constitute a mandatory bargaining subject because they have tangible effects on the wages and working conditions of current NFL players. Because the unusual economic imperatives of professional sports raise "numerous problems with little or no precedent in standard industrial relations," *Wood*, 809 F.2d at 961, we have recognized that many of the arrangements in professional sports that, at first glance, might not appear to deal with wages or working conditions are indeed mandatory bargaining subjects, *see Silverman v. Major League Baseball Player Relations Comm.*, Inc., 67 F.3d 1054, 1061 (2d Cir.1995). In *Silverman*, for example, we recognized that "[a] mix of free agency and reserve clauses combined with other provisions [such as a rookie draft and salary caps] is the universal method by which leagues and players unions set individual salaries in professional sports." *Id.* We therefore held that the issues of free agency, an anti-collusion provision in players' contracts, and major league baseball's reserve system are mandatory

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Mine Workers, 711 F.2d 530, 542 (3d. Cir.1983) ("[Non-statutory exemption] generally applies when a union, acting with a non-labor party, seeks to attain goals which are mandatory or permissive subjects of bargaining under the National Labor Relations Act, unless the Union acts with a predatory anti-competitive purpose." (emphasis added and footnote omitted)).

bargaining subjects in the context of professional baseball. Id. Similarly, the complex scheme by which individual salaries in the NFL are set, which involves, *inter alia*, the NFL draft, league-wide salary pools for rookies, team salary caps, and free agency, was built around the longstanding restraint on the market for entering players imposed by the eligibility rules and the related expectations about the average career length of NFL players. The eligibility rules in other words cannot be viewed in isolation, because their elimination might well alter certain assumptions underlying the collective bargaining agreement between the NFL and its players union.

Furthermore, by reducing competition in the market for entering players, the eligibility rules also affect the job security of veteran players. *See Fibreboard*, 379 U.S. at 210-15, 85 S.Ct. 398 (recognizing union members' "vital concern" in preserving jobs for union members); *see also Intercontinental Container Transp. Corp. v. N.Y. Shipping Ass'n*, 426 F.2d 884, 887-88 (2d Cir. 1970) ("[T]he preservation of jobs is within the area of proper union concern[, and u]nion activity having as its object the preservation of jobs for union members is not violative of the anti-trust laws." (internal citations omitted)). Because the size of NFL teams is capped, the eligibility rules diminish a veteran player's risk of being replaced by either a drafted rookie or a player who enters the draft and, though not drafted, is then hired as a rookie free agent. *See* Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 *Yale L.J.* 1, 16 (1971) (recognizing that entry of new players through draft "has an enormous effect on those already in the unit and the collective agreement which governs them"). Consequently, as was true in Silverman, we find that to regard the NFL's eligibility rules as merely permissive bargaining subjects "would ignore the reality of collective bargaining in sports." *Silverman*, 67 F.3d at 1061-62.

Clarett, however, argues that the eligibility rules are an impermissible bargaining subject because they affect players outside of the union. But simply because the eligibility rules work a hardship on prospective rather than current employees does not render them impermissible. *See Wood*, 809 F.2d at 960. The eligibility rules in this respect are not dissimilar to union demands for hiring hall arrangements that have long been recognized as mandatory subjects of bargaining. *See Associated Gen. Contractors of America, Houston Chapter*, 143 N.L.R.B. 409, 412, *enforced*, 349 F.2d 449 (5th Cir.1965) ("'[E]mployment' connotes the initial act of employing as well as the consequent state of being employed."). In such hiring hall arrangements, the criteria for employment are set by the rules of the hiring hall rather than the employer alone. *See* R. Gorman, *Labor Law* at 666-70. Nevertheless, such an arrangement constitutes a permissible, mandatory subject of bargaining despite the fact that it concerns prospective rather than current employees. *Wood*, 809 F.2d at 960.

As a permissible, mandatory subject of bargaining, the conditions under which a prospective player, like Clarett, will be considered for employment as an NFL player are for the union representative and the NFL to determine. Clarett, however, stresses that the eligibility rules are arbitrary and that requiring him to wait another football season has nothing to do with whether he is in fact qualified for professional play. But Clarett is in this respect no different from the typical worker who is confident that he or she has the skills to fill a job vacancy but does not possess the qualifications or meet the requisite criteria that have been set. In the context of this collective bargaining relationship, the NFL and its players union can agree that an employee will not be hired or considered for employment for nearly any reason whatsoever so long as they do not violate federal laws such as those prohibiting unfair labor practices, 29 U.S.C. § 201 *et seq.*, or

discrimination, 42 U.S.C. § 2000e *et seq. See Reliance Ins. Cos. v. NLRB*, 415 F.2d 1, 6 (8th Cir.1969) ("[Employer is usually free to] pick and choose his employees and hire those he thinks will best serve his business interests."). Any challenge to those criteria must "be founded on labor rather than antitrust law." *Caldwell*, 66 F.3d at 530.

Even accepting that an individual club could refuse to consider him for employment because he is less than three full seasons out of high school, Clarett contends that the NFL clubs invited antitrust liability when they agreed amongst themselves to impose that same criteria on every prospective player. As a consequence of the NFL's unique position in the professional football market, of course, such joint action deprives Clarett of the opportunity to pursue, at least for the time being, the kind of high-paying, high-profile career he desires. In the context of collective bargaining, however, federal labor policy permits the NFL teams to act collectively as a multi-employer bargaining unit in structuring the rules of play and setting the criteria for player employment. Such concerted action is encouraged as a matter of labor policy and tolerated as a matter of antitrust law, *see Williams*, 45 F.3d at 593, despite the fact that it "plainly involve [s] horizontal competitors for labor acting in concert to set and to implement terms of employment," *Caldwell*, 66 F.3d at 529. Multi-employer bargaining in professional sports, moreover, offers the added advantage of allowing the teams to agree with one another and, as required, bargain with the union over the host of uniform rules needed for the successful operation of the league, such as the "[n]umber of games, length of season, playoff structures, and roster size and composition." *Williams*, 45 F.3d at 689. The fact that the challenged rules govern eligibility for the NFL draft, thereby excluding some potential employees from consideration, does not render the NFL's adherence to its eligibility rules as a multi-employer bargaining unit suspect.

The threat to the operation of federal labor law posed by Clarett's antitrust claims is in no way diminished by Clarett's contention that the rules were not bargained over during the negotiations that preceded the current collective bargaining agreement. The eligibility rules, along with the host of other NFL rules and policies affecting the terms and conditions of NFL players included in the NFL's Constitution and Bylaws, were well known to the union, and a copy of the Constitution and Bylaws was presented to the union during negotiations. Given that the eligibility rules are a mandatory bargaining subject for the reasons set out above, the union or the NFL could have forced the other to the bargaining table if either felt that a change was warranted. *See NLRB v. Katz*, 369 U.S. 736, 743, 82 S.Ct. 1107, 8 L. Ed. 2d 230 (1962). Indeed, according to the declaration from the NFLMC's Vice President for Labor Relations, Peter Ruocco, this is exactly what the NFL did.

Although this declaration was the only evidence on this point and went uncontradicted by Clarett below, the district court found that this evidence was insufficient to entitle the NFL to a non-statutory exemption defense as a matter of law.[213] *See Clarett*, 306 F. Supp. 2d at 396-97. But even disregarding this evidence entirely, the collective bargaining agreement itself makes clear that the union and the NFL reached an agreement with respect to how the eligibility rules would be handled. In the collective bargaining agreement, the union agreed to waive any challenge to the Constitution and Bylaws and thereby acquiesced in the continuing operation of the eligibility rules

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[213] We do not here address whether the district court was correct to regard the non-statutory exemption as an affirmative defense for which the defendant bore the burden of proof. *Cf. USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council*, 31 F.3d 800, 805 n. 3 (9th Cir.1994) (noting that although defendants typically bear burden of proving entitlement to exception from the antitrust laws, "statutory exemption is not an affirmative defense").

contained therein – at least for the duration of the agreement. The terms of that waiver not only keep the eligibility rules in effect for the length of the agreement but also leave the NFL in control of any changes to the eligibility rules on the condition that any significant change potentially affecting the terms and conditions of players' employment would be preceded by notice to the union and an opportunity to bargain. The value of such a clause to the NFL is obvious, as control over any changes to the eligibility rules is left in the hands of management at least until the expiration of the collective bargaining agreement. Although it is entirely possible that the players union might not have agreed entirely with the eligibility rules, the union representative might not have regarded any difference of opinion with respect to the eligibility rules as sufficient to warrant the expenditure of precious time at the bargaining table in light of other important issues.

Clarett would have us hold that by reaching this arrangement rather than fixing the eligibility rules in the text of the collective bargaining agreement or in failing to wrangle over the eligibility rules at the bargaining table, the NFL left itself open to antitrust liability. Such a holding, however, would completely contradict prior decisions recognizing that the labor law policies that warrant withholding antitrust scrutiny are not limited to protecting only terms contained in collective bargaining agreements. *See Brown*, 518 U.S. at 243-44, 116 S.Ct. 2116; *Caldwell*, 66 F.3d at 528-29 & n. 1. The reach of those policies, rather, extends as far as is necessary to ensure the successful operation of the collective bargaining process and to safeguard the "unique bundle of compromises" reached by the NFL and the players union as a means of settling their differences.[214] *Wood*, 809 F.2d at 961. It would disregard

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[214] We therefore need not determine whether as a matter of law the Constitution and Bylaws that contained the eligibility rules were

those policies completely to hold that some "particular *quid pro quo* must be proven to avoid antitrust liability," *id.* at 962 n. 5, or to allow Clarett to undo what we assume the NFL and its players union regarded as the most appropriate or expedient means of settling their differences, *id.* at 961. We have cautioned before that "[t]o the extent that courts prohibit particular solutions for particular problems, they reduce the number and quality of compromises available to unions and employers for resolving their differences." *Id.* Clarett would have us disregard our own good advice.

The disruptions to federal labor policy that would be occasioned by Clarett's antitrust suit, moreover, would not vindicate any of the antitrust policies that the Supreme Court has said may warrant the withholding of the non-statutory exemption. This is simply not a case in which the NFL is alleged to have conspired with its players union to drive its competitors out of the market for professional football. *See Pennington*, 381 U.S. at 665, 85 S.Ct. 1585. Nor does Clarett contend that the NFL uses the eligibility rules as an unlawful means of maintaining its dominant position in that market. *See Allen Bradley Co.*, 325 U.S. at 809, 65 S.Ct. 1533 ("The primary objective of all the Anti-trust legislation has been to preserve business competition and to proscribe business monopoly."). This lawsuit reflects simply a prospective employee's disagreement with the criteria, established by the employer and the labor union, that he must meet in order to be considered for employment. Any remedies for such a claim are the province of labor law. Allowing Clarett to proceed with his antitrust suit would subvert "principles that have been familiar to, and accepted by, the nation's workers for all of the NLRA's [sixty years] in every industry except professional sports."

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incorporated by reference into the current collective bargaining agreement.

Caldwell, 66 F.3d at 530. We, however, follow the Supreme Court's lead in declining to "fashion an antitrust exemption [so as to give] additional advantages to professional football players ... that transport workers, coal miners, or meat packers would not enjoy." *Brown*, 518 U.S. at 249, 116 S.Ct. 2116.

CONCLUSION

For the foregoing reasons, the judgment of the district court is REVERSED and the case REMANDED with instructions to enter judgment in favor of the NFL. The order of the district court designating Clarett eligible to enter this year's NFL draft is VACATED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 15th day of October two thousand four.

Maurice Clarett,

Plaintiff-Appellee,

v.

National Football League, Inc.,

Defendant-Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Maurice Clarett.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk
By: /s/
Motion Staff Attorney

True and correct excerpt from amicus curiae brief in support of Clarett filed with the Second Circuit Court of Appeals by John L. Conyers, Jr. of the Committee on the Judiciary United States House of Representatives:

> As the Ranking Democrat on the House Judiciary Committee, amicus has an overriding interest in preserving and protecting the antitrust laws. Amicus is concerned that the non-statutory labor exemption not be extended in a manner that would undermine the integrity of the antitrust laws or intrude on Congress' traditional purview in enacting such laws. In addition, amicus believes that Clarett, who has been foreclosed from being able to seek employment in the NFL, is precisely the type of party Congress envisioned being able to seek relief under the antitrust laws.

(3)

Supreme Court, U.S.
FILED
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No. 04-910

IN THE

Supreme Court of the United States

MAURICE CLARETT,

Petitioner,

v.

NATIONAL FOOTBALL LEAGUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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March 4, 2005

QUESTION PRESENTED

Whether the Second Circuit, consistent with the decisions of every other court to address the scope of the non-statutory labor exemption to the antitrust laws, correctly held that the exemption applies to a collectively bargained rule governing the eligibility of players for the National Football League's annual draft.

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are named in the caption. Respondent National Football League is an unincorporated association consisting of thirty-two member clubs. The National Football League does not issue stock.

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Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage,* 81 Yale L.J. 1 (1971) 8

STATEMENT OF THE CASE

Petitioner Maurice Clarett seeks review of a unanimous decision of the United States Court of Appeals for the Second Circuit holding that the non-statutory labor exemption bars his antitrust action against the National Football League. Clarett challenged, under Section 1 of the Sherman Act, 15 U.S.C. § 1, a long-standing NFL rule, to which the NFL players' union had agreed in collective bargaining, requiring players to be three years beyond their high school graduation in order to be eligible for the NFL draft. The Court of Appeals' decision is in full accord with this Court's precedent, as well as with the holdings of the other circuit courts, regarding the scope and application of the non-statutory exemption.

1. Relevant Facts.

The NFL is an unincorporated association of thirty-two member clubs; the League's Constitution and Bylaws set forth the NFL's policies and procedures. The Constitution and Bylaws have provided since 1990 that a player is not eligible for selection in the NFL draft until three football seasons have elapsed since his high school graduation. C.A. App. 129.

Since May 1993, a collective bargaining agreement ("CBA") between the NFL's multi-employer bargaining unit, the NFL Management Council, and the players' authorized collective bargaining representative, the National Football League Players' Association ("NFLPA"), has governed the terms and conditions of employment of NFL players. *Id.*

When it executed the CBA in 1993, the NFLPA agreed to certain then-existing provisions of the NFL Constitution and Bylaws, including the challenged eligibility rule. The CBA contains an explicit commitment by the NFLPA not to challenge those provisions, C.A. App. 157, and an express waiver by the NFLPA of its right, for the

duration of the CBA, to bargain over those provisions, *id.* at 155. The parties confirmed in a letter agreement, executed contemporaneously with the CBA, that the challenged eligibility rule is one of the provisions to which the NFLPA agreed. *Id.* at 165–72. The rule itself was specifically addressed during the course of collective bargaining that led to the CBA. *Id.* at 140.

Petitioner, who graduated from high school in December 2001, was not eligible for selection in the most recent NFL Draft, held in April 2004. *Id.* at 129. Petitioner will be eligible for selection in the next NFL Draft, scheduled for April 2005.

2. Proceedings in the District Court.

Petitioner filed suit in September 2003 in the United States District Court for the Southern District of New York, alleging that the NFL draft eligibility rule constitutes a *per se* violation of the Sherman Act; he sought damages for his allegedly wrongful exclusion from the 2003 NFL Draft as well as an order declaring him eligible for selection in the 2004 NFL Draft. C.A. App. 7.

Pursuant to an expedited briefing schedule, *id.* at 15, the NFL moved for summary judgment on two grounds: (i) that the non-statutory labor exemption barred the claim; and (ii) that because of market conditions established by the CBA, Petitioner could not demonstrate antitrust injury. *Id.* at 129, 183. Petitioner also moved for summary judgment, claiming that the eligibility rule was a group boycott constituting a *per se* violation of Section 1 of the Sherman Act. *Id.* at 133.

On February 5, 2004, the District Court (Scheindlin, J.), without hearing oral argument, denied the NFL's motions and granted summary judgment for Petitioner, holding that the challenged eligibility rule is a "naked restraint of trade" and determining that "[b]ecause the NFL cannot prevail on

[its non-statutory labor exemption or antitrust injury defenses], the Rule must be sacked." Pet. App. 50, 2. The District Court ordered that Petitioner be deemed eligible for selection in the 2004 NFL Draft. *Id.* at 60.

The NFL promptly moved for a stay pending appeal; the District Court denied that motion on February 11, 2004, C.A. App. 619–35, after which Petitioner dropped his claim for damages associated with his alleged exclusion from the 2003 NFL Draft. *Id.* at 633. The District Court entered final judgment on February 18, 2004, and the NFL noticed its appeal immediately thereafter. *Id.* at 194.

3. Proceedings in the Court of Appeals.

Faced with the possibility that, absent a stay, its appeal could become moot if Petitioner were selected in the 2004 NFL Draft (scheduled for April 24–25), the NFL immediately sought a stay, or in the alternative, expedited review, in the Court of Appeals. On March 30, 2004, after more than an hour of oral argument, the Second Circuit (Cabranes, Feinberg, and Pooler, JJ.) granted the NFL's request for expedited review, set an accelerated briefing schedule, scheduled oral argument on the merits for April 19, 2004, and referred the NFL's stay motion to the merits panel.

On April 19, 2004, soon after oral argument on the merits, the Second Circuit (Sotomayor and Sack, Circuit Judges; Kaplan, District Judge, sitting by designation) granted the NFL's motion for stay, citing, among other things, the League's "likelihood of success on the merits." Resp. App. 2a. The next day, Petitioner applied to Justice Ginsburg, as Circuit Justice, to vacate the stay; that application was denied. *See In re Clarett v. Nat'l Football League*, No. 03A870 (U.S. Apr. 22, 2004). Petitioner then refiled his application with Justice Stevens, who denied it the same day. *See id.*

On May 24, 2004, the Second Circuit issued its decision on the merits, unanimously holding that the non-statutory labor exemption barred Petitioner's claim, and reversing and remanding with instructions to enter judgment for the NFL. *See* Pet. App. 61–97.

The Second Circuit denied Petitioner's petition for rehearing or rehearing en banc on October 15, 2004. *Id.* at 98.[1]

REASONS FOR DENYING THE WRIT

In the nearly sixty-five years since this Court first recognized the non-statutory labor exemption, no court of which we are aware has ever deemed unlawful under the Sherman Act a restraint, agreed to in collective bargaining, that principally affected competition in a labor market. This Court and the lower federal courts consistently have held that such restraints are the exclusive province of the labor laws. *See Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503 (1940) ("[I]t would seem plain that restraints on the sale of the employee's services to the employer ... are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act."); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975) ("The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working

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[1] Due in large part to his own litigation choices, the practical importance of this case to Petitioner has diminished over time. In order to secure a prompt resolution of his claim for attorneys' fees, Petitioner elected, immediately after he prevailed in the District Court, to drop his claim for damages associated with the 2003 Draft. He failed to seek preliminary injunctive relief during the 2004 NFL season, which of course is now over. And Petitioner is eligible for the 2005 NFL Draft, so there are neither injunctive nor damages issues presented with regard to future seasons. In short, Petitioner's stake in this action is now limited to damages for the 2004 NFL season.

conditions."); *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236–37 (1996) ("[The non-statutory labor exemption] substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the appropriate legal limits of industrial conflict.").

Because "the only alleged anticompetitive effect of the challenged restraint is on a labor market organized around a collective bargaining relationship," Pet. App. 78–79, the Second Circuit's decision below is fully in accord with this unbroken line of authority. The Court of Appeals' decision squarely reflects the fundamental principles underlying the non-statutory labor exemption, which seeks to reconcile "the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in *business* markets." *Connell Constr. Co.*, 421 U.S. at 622 (emphasis added).

No federal antitrust interest is implicated by a collectively bargained agreement with a single employer that "restrains" competition over terms and conditions of employment. *See* IA Phillip E. Areeda & Donald K. Hovenkamp, *Antitrust Law* ¶ 256a (2d ed. 2000) ("The simplest agreement between an employer and a union representing employees needs no antitrust immunity, for no antitrust laws are violated."). At the same time, the federal labor laws strongly encourage *multi-employer* collective bargaining. *See NLRB v. Truck Drivers Local Union No. 449 ("Buffalo Linen")*, 353 U.S. 87, 95 (1957) (characterizing multi-employer bargaining as a "vital factor in the effectuation of the national labor policy of promoting labor peace through strengthened collective bargaining"); *Brown*, 518 U.S. at 240–41 (same).

In these circumstances, the appropriate balance of federal labor law and federal antitrust law is clear: Subjecting to potential antitrust liability agreements reached in multi-employer bargaining – agreements that unquestionably would

be lawful if entered into by a single employer – would inevitably undermine federal labor policy, a consequence against which this Court expressly warned in *Brown*. *See* 518 U.S. at 242 ("[T]o permit antitrust liability here threatens to introduce instability and uncertainty into the collective-bargaining process, for the antitrust law often forbids or discourages the kinds of joint discussions and behavior that the collective-bargaining process invites or requires."). That would be true in any industry, but it is especially true with respect to professional sports, in which league members function "more like a single bargaining employer" than separate employers. *Id.* at 249.

The justifications for review asserted in the petition take no regard of the foregoing principles. As we further demonstrate below, the petition rests on illusory distinctions drawn from dictum in a nearly thirty-year old opinion addressing a restraint to which the union had *not* agreed. *See Mackey v. National Football League*, 543 F.2d 606, 615–16 (8th Cir. 1976). That dated decision has no relevance here.

The grounds for certiorari advanced by Petitioner mirror the unfounded arguments thoroughly rejected by the Court of Appeals. Tracking the three-part test set forth in *Mackey*, Petitioner contends that the challenged eligibility rule is not within the scope of the non-statutory labor exemption because the rule (i) does not concern a mandatory subject of collective bargaining; (ii) primarily affects prospective, rather than current, employees; and (iii) was not the product of good faith, arms' length negotiations between the League and the players' union. Petitioner is wrong in all three respects.

1. Mandatory vs. Permissive Subject of Bargaining.

As an initial matter, there is no serious question that the challenged eligibility rule is a mandatory subject of

collective bargaining.[2] The federal courts are *unanimous* in holding that player drafts in professional sports leagues constitute mandatory bargaining subjects protected by the non-statutory exemption. *See, e.g., Wood v. National Basketball Ass'n*, 809 F.2d 954, 962 (2d Cir. 1987) (NBA draft); *White v. National Football League*, 836 F. Supp. 1458, 1501 (D. Minn. 1993) (NFL draft), *aff'd*, 41 F.3d 402 (8th Cir. 1994); *Powell v. National Football League*, 711 F. Supp. 959, 962 (D. Minn. 1989) (NFL draft); *Zimmerman v. National Football League*, 632 F. Supp. 398, 404 (D.D.C 1986) (NFL supplemental draft); *Smith v. Pro-Football, Inc.*, 420 F. Supp. 738, 744 (D.D.C. 1976) (discussing "the fairly clearly mandatory bargaining nature" of NFL draft), *rev'd, in part, on other grounds*, 593 F.2d 1173 (D.C. Cir. 1978). If professional sports leagues and their players are *required* to bargain over the rules governing player drafts, then it follows *a fortiori* that rules establishing *eligibility* for player drafts also are mandatory bargaining subjects. *Cf.* Pet. App. 90 (draft eligibility rules "represent a quite literal condition for initial employment and for that reason alone might constitute a mandatory bargaining subject"); *see also Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1061–62 (2d Cir. 1995) ("Free agency for veteran players may ... be combined with a reserve system, as in baseball, or a rookie draft, as in basketball, for newer players. A salary cap may or may not be included. *To hold that any of these items, or others that make up the mix in a particular sport, is merely a permissive subject of bargaining would ignore the reality of collective bargaining in sports.*" (emphasis added and citations omitted)).

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[2] Mandatory subjects of bargaining are "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). All other lawful areas of negotiation are considered "permissive subjects." *See NLRB v. Wooster Div. of Borg Warner Corp.*, 356 U.S. 342, 349 (1958).

Draft eligibility rules are mandatory subjects for a separate and additional reason: they "vitally affect" the terms and conditions of current players' employment. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210–15 (1964). At issue in *Fibreboard* was the "contracting out" of work to non-union employees; this Court held that the practice was a mandatory subject, even though it directly involved only non-union workers, because it "necessarily result[ed]" in the termination of union members' employment. *Id.* at 210; *see also Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 179–80 (1971) (discussing *Fibreboard* and "vitally affects" test).

Just as the practice of "contracting out" work to non-union employees "vitally affected" the interests of union members in *Fibreboard*, so too does the challenged draft eligibility rule "vitally affect" the interests of all current NFL players. The rule protects the job security of current NFL players because it limits the number of prospective players eligible to compete for NFL roster spots; it protects the wages of current players for similar reasons. *See Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 294–95 (1959) ("minimum rental" provision applicable only to non-union truck drivers was mandatory subject because its object was "the maintenance of the basic wage structure established by [the CBA]"; holding provision immune from challenge under state antitrust laws); Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining: Of Superstars in Peonage*, 81 Yale L.J. 1, 16 (1971) ("The method by which new players enter has an enormous effect on those already in the unit and the collective agreement which governs them.").[3]

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[3] Petitioner's reliance on the unenforced decision of the NLRB in *Star Tribune*, 295 N.L.R.B. 543 (1989), is unfounded. *Star Tribune* had (continued...)

In any event, Petitioner's insistence that the rule does not concern a mandatory bargaining subject is a red herring. No appellate court of which we are aware has ever declined to apply the exemption because the challenged restraint did not concern a mandatory subject. And this Court's precedents confirm that the exemption extends to agreements concerning permissive subjects that (i) are "intimately related" to legitimate objects of union concern and (ii) focus principally on the labor, as opposed to the business or output, market. *See, e.g., Local Union 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Jewel Tea Co.*, 381 U.S. 676 (1965).

Jewel Tea applied the exemption to a collectively bargained provision limiting the time during which grocery stores could sell pre-packaged meats; the restraint was held immune from antitrust challenge because it was "*intimately related to* wages, hours and working conditions" of the butcher-employees. *Id.* at 689 (White, J.) (emphasis added). By including within the scope of the exemption restraints "intimately related to" mandatory subjects, Justice White made clear that the exemption is not limited to such subjects. The "crucial determinant" is not the mandatory or permissive nature of the challenged restraint, but rather its "relative impact on the product market and the interests of the union members." *Id.* at 690 n.5.

Following *Jewel Tea*, numerous courts of appeals have recognized that the exemption extends to agreements

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nothing to do with the labor exemption. Moreover, unlike the record here, the record in *Star Tribune* contained no evidence about the impact of the conduct at issue (applicant drug-testing) on current employees. *See id.* at 547–48 & n.16. Accordingly, that decision affords no basis for challenging the Second Circuit's conclusion that the eligibility rule "vitally affects" the interests of current NFL players, Pet. App. 91, and it surely offers no basis for this Court's review of the Second Circuit's decision. *See* S. Ct. R. 10(a).

concerning non-mandatory bargaining subjects. *See, e.g., Sheet Metal Workers Local Union No. 54 v. E.F. Etie Sheet Metal Co.*, 1 F.3d 1464, 1474–75 (5th Cir. 1993) (exemption applied to non-mandatory "interests arbitration clause"); *Feather v. United Mine Workers of Am.*, 711 F.2d 530, 542 & n.13 (3d Cir. 1983) (non-statutory labor exemption "generally applies when a union, acting with a non-labor party, seeks to attain goals which are mandatory *or permissive* subjects of bargaining" (emphasis added)); *Home Box Office, Inc. v. Directors Guild of Am., Inc.*, 531 F. Supp. 578, 609 (S.D.N.Y. 1982) ("*Whether or not* the particular provision ... would be a mandatory subject of bargaining, provisions with just the same purpose and effect were found within the nonstatutory exemption in *Jewel Tea* ...." (emphasis added)), *aff'd on op. of dist. ct.*, 708 F.2d 95 (2d Cir. 1983); *cf. Berman Enters. Inc. v. Local 333, United Marine Div., Int'l Longshoremen's Ass'n*, 644 F.2d 930, 935 (2d Cir. 1981) ("agreements reached on nonmandatory subjects of bargaining ... are not within the nonstatutory exemption *if they constitute restraints on competition in a business market*" (emphasis added)). *See generally* IA Areeda & Hovenkamp, *supra*, ¶ 257 n.28 ("[T]he immunity can also extend to multi-employer agreements covering permissive, or nonmandatory, subjects of collective bargaining.").[4]

In short, at least in circumstances where the union has agreed to the challenged restraint, the distinction between mandatory and permissive bargaining subjects does not affect application of the exemption. Even if this Court were to find that the challenged restraint concerns a permissive subject,

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[4] As this Court reaffirmed in *Brown*, "implied antitrust immunities ... extend beyond the statutorily *required* joint action [*i.e.*, mandatory action] to joint action that a statute expressly or impliedly allows [*i.e.*, permissive action] ...." 518 U.S. at 244–45 (emphasis in original; internal quotations and citations omitted).

the circuit "conflict" that Petitioner premises on that distinction would be entirely illusory.

2. Prospective vs. Current Employee.

Petitioner's status as a "prospective" employee – as opposed to a current employee – similarly provides no basis for challenging the Second Circuit's decision. No court of which we are aware has ever relied on such a distinction to hold that the non-statutory exemption should not apply to a challenged restraint.

Petitioner's selective quotations from *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797 (1945), *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), badly miss the mark. The "outsiders" in those cases – employers and their competitors – alleged restraints on competition not in the labor/input market, but rather in the business/output market. Here, in contrast, the alleged restraint is of a *labor* market; that fact, rather than the identity or status of the plaintiff, is the key factor in determining whether the exemption applies. *See Connell Constr. Co.*, 421 U.S. at 622 (non-statutory labor exemption accommodates "the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in *business* markets" (emphasis added)); *Mid-America Regional Bargaining Ass'n v. Will County Carpenters Dist. Council*, 675 F.2d 881, 893 (7th Cir. 1982) ("[A] complaint must allege conduct operating as a direct restraint upon the business market in order to avoid application of the nonstatutory exemption. ... The complaint alleges no more than an agreement to restrain the labor market. As such, it is exempt from antitrust scrutiny."); *Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F.2d 494, 514 (3d Cir. 1979) ("[T]he rationale of the exemption is protection of the union's power to eliminate competition in the labor market over wages and working

conditions. Restraints operating on that [*i.e.*, the labor] market are presumptively outside the scope of the Sherman Act.").[5]

In any event, Petitioner is by no means a "stranger" to the collective bargaining relationship, as he contends. *See* Pet. 10. Put simply, he seeks to avail himself of the benefits of that relationship – including collectively bargained terms and conditions of NFL employment such as guaranteed minimum salaries, medical care, and retirement plans – without satisfying the collectively bargained eligibility requirements with which every other NFL player-employee has complied. Such circumvention of the collective bargaining process is expressly proscribed by the federal labor laws, and would serve no purpose under the federal antitrust laws. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) ("[Labor policy] extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees."); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683–84 (1944) ("The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees ... [and] exacts 'the negative duty to treat with no other.'") (citations omitted).

Collective bargaining agreements routinely include terms and conditions of employment, such as seniority provisions and hiring hall arrangements, that benefit current employees to the detriment of new and prospective employees. *See, e.g.*, *Ford Motor Co. v. Huffman*, 345 U.S.

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[5] Petitioner's disregard of the principles underlying the non-statutory exemption is explained in part by his failure to recognize any distinction between the labor/input market and the product/output market. *See, e.g.*, Pet. 13 ("So-called 'product' and 'labor' markets are so intertwined and interconnected that they cannot be distinguished from one another.").

330, 338–39 (1953) (upholding collectively bargained seniority provisions); *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667, 675–77 (1961) (upholding union hiring halls). At bottom, Petitioner complains that the Second Circuit failed to create an exception to the non-statutory labor exemption for collectively bargained agreements containing such provisions. No decision of which we are aware supports such an exception, which would undermine established federal labor policy in numerous respects.[6]

3. The Form of the Agreement.

Because the challenged eligibility rule appeared first in the NFL Constitution and Bylaws and was then endorsed by the union through CBA provisions and a contemporaneous side letter (*see* pp. 1–2, above), Petitioner argues that the rule is not the product of good faith, arms'-length negotiations and therefore falls outside the scope of the labor exemption. Pet. 24–25. Petitioner's *premise*, a classic elevation of form over substance, presents a purely factual question painstakingly addressed by the Court of Appeals. *See* Pet. App. 65–69, 94–95. His *conclusion* cannot be reconciled with this Court's holding in *Brown*, which squarely rejected the contention that "the implicit exemption applies only to labor-management *agreements*." 518 U.S. at 243 (emphasis in original).

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[6] Petitioner claims to find support for his position in this Court's decision in *Brown*, but his analysis of that case is not nearly as strong as his rhetoric. *See* Pet. 16 (alleging that the Second Circuit "misused *Brown*" and reached a result "in defiance" of this Court's express "reservations" in *Brown*). The only "reservations" expressed in *Brown* concerned the need for the Court to decide (or its ability to decide) in that case the *duration* of the exemption when applied to terms and conditions *imposed* by employers over a union's objection. *See* 518 U.S. at 250. Such "reservations" have no conceivable relevance here.

Undisputed evidence demonstrated that the NFL and the NFLPA, following good faith, arms'-length collective bargaining, reached agreement with respect to the challenged eligibility rule.[7] The fact that the agreement is partially reflected in an explanatory side letter is of no consequence under either the antitrust laws or the labor laws. And there is no basis for this Court to disturb the Court of Appeals' thorough assessment of this fact-bound issue. *See NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (dismissing writ of certiorari as improvidently granted where petition presented "primarily ... a question of fact"); *Rudolph v. United States*, 370 U.S. 269 (1962) (same).

In this respect, among others, this case is fundamentally different from *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), upon which Petitioner principally relies. In *Mackey*, the court found that the union had not agreed to the challenged restraint; on that basis, it held that the labor exemption did not apply. *Id.* at 615-16. Here, in contrast, the union *did* agree to the challenged restraint. The distinction is important, because where the

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[7] In Article III of the CBA (entitled "Scope of the Agreement"), the NFLPA expressly "waive[d] all rights to bargain with . . . [the NFL clubs] concerning ... the provisions of the NFL Constitution and Bylaws." C.A. App. 155. In Article IV, the NFLPA agreed that neither it "nor any of its members, agents acting on its behalf, nor any members of its bargaining unit will sue, or support financially or administratively any suit against, the NFL or any Club relating to the presently existing provisions of the Constitution and Bylaws of the NFL as they are currently operative and administered ...." *Id.* at 157. A collectively-bargained "side letter" agreement executed contemporaneously with the CBA confirmed that the challenged eligibility rule was among the terms of the Constitution and Bylaws to which the foregoing CBA provisions applied. *Id.* at 165–72. Finally, the uncontradicted declaration of NFL Executive Vice President for Labor Relations, Peter Ruocco, established that the "eligibility rule itself was the subject of collective bargaining" between the League and the players' union. *Id.* at 140; Pet. App. 94–95.

union has agreed, the sole question becomes whether the principal effect of the restraint is on the labor market or the business market; the *form* of the agreement is immaterial. *See supra,* pp. 11–12.[8]

* * *

As a general matter, the grounds Petitioner advances in support of certiorari reflect the same mistake that the petitioners made in *Brown*. Petitioner asserts limitations on the non-statutory labor exemption "deduce[d] from [the] case law language," but he utterly fails to take into account "the exemption's rationale." 518 U.S. at 243. Here, the challenged restraint (i) is one to which the union has agreed in collective bargaining, and (ii) restrains competition only in a labor market. Accordingly, the "exemption's rationale" – reconciling "the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in *business* markets" – applies with compelling force. *Connell Constr. Co.*, 421 U.S. at 622

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[8] Petitioner misreads *Mackey* as requiring a specific *quid pro quo* from the employer before the exemption can be applied. Such a requirement, which could not in any event be reconciled with this Court's decision in *Brown*, was rejected by every federal court to address the issue, including the Eighth Circuit itself, in the wake of *Mackey*. *See Powell v. National Football League*, 930 F.2d 1293, 1301 (8th Cir. 1989) (NFL's "restricted free agency" system, unilaterally imposed by the League after bargaining to impasse, was immune from antitrust challenge under the labor exemption); *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987) (noting that the non-statutory exemption is not "limited to restraints imposed by collective bargaining agreements"); *Wood*, 809 F.2d at 962 n.5 (emphasizing that "a particular *quid pro quo* [need not] be proven to avoid antitrust liability"); *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1200 (6th Cir. 1979) ("That the position of one party on an issue prevails unchanged does not mandate the conclusion that there was no collective bargaining over the issue."); *Zimmerman v. National Football League*, 632 F. Supp. 398, 407 (D.D.C. 1986) ("[N]othing in either *Mackey* or *McCourt* requires that a *quid pro quo* be contained in the agreement under consideration.").

(emphasis added). There is no authority even hinting that the Second Circuit should have reached, or that another court of appeals would have reached, a different conclusion.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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Counsel for Respondent

March 4, 2005

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 19th day of April two thousand four,

Present:

Hon. Robert D. Sack,
Hon. Sonia Sotomayor,
Circuit Judges,
Hon. Lewis A. Kaplan,*
District Judge.

*The Honorable Lewis A. Kaplan of the United States District Court for the Southern District of New York, sitting by designation.

Maurice Clarett,

Plaintiff-Appellee,

v. No. 04-0943

National Football League, Inc.,

Defendant-Appellant.

We reserve decision on the merits of this appeal. A decision and opinion will follow.

Appellant's motion for a stay pending the resolution of this appeal having been denied by the district court, appellant has moved before this Court for a stay pending the outcome of this appeal of the district court's opinion and order declaring appellee eligible to participate in the 2004 NFL draft. "Four criteria are relevant in considering whether to issue a stay of an order of a district court . . . pending appeal: the likelihood of success on the merits, irreparable injury if a stay is denied, substantial injury to the party opposing a stay if one is issued, and the public interest." Mohammed v. Reno, 309 F.3d 95, 100 (2d Cir. 2002).

Appellant has demonstrated a likelihood of success on the merits. And any potential harm done to appellee by granting this motion to stay is sufficiently countermanded by the strength of the other factors weighing in appellant's favor, see id. at 101. Appellant's agreement to hold a supplemental draft for appellee and all others similarly situated also mitigates any harm to the appellee in the event of his ultimately prevailing in this appeal. A stay is thus warranted to safeguard appellant from harm and ensure meaningful review of the issues presented by this appeal.

Upon due consideration, it is hereby **ORDERED** that appellant's motion for a stay pending the resolution of this appeal is **GRANTED**, effective immediately.

FOR THE COURT:

Roseann B. MacKechnie, Clerk

By:_____
Elizabeth Cronin
Director, Office of Legal Affairs